SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1057

LOUIS E. WOLFSON AND ELKIN B. GERBERT,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for
Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for
Petitioner Wolfson

Of Counsel:
ARNOLD & PORTER
JAMES E. KEBER
HOGAN & HARTSON
AUSTIN S. MITTLER
Washington, D.C.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Louis E. Wolfson and Elkin B. Gerbert pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It appears in CCH Fed. Sec. L. Rep. ¶ 92,328 (2d Cir., Dec. 27, 1968) and is reprinted as Appendix A hereto, pp. A-1 to A-12, *infra*. The opinion of the District Court denying certain pretrial motions is reported at 269 F. Supp.

621 (S.D.N.Y. 1967), and is reprinted as Appendix C hereto, pp. C-1 to C-10, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1968. A timely Petition for Rehearing was denied on January 23, 1969. (Appendix B, p. B-1, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Whether the Securities Act of 1933 can be construed to prohibit the sale in normal brokerage transactions of securities owned by a controlling person of the issuing corporation.

(b) Whether, if so, the Securities Act of 1933 is unconstitutionally vague as applied in this case.

2. Whether defendants are denied due process when they attempt to challenge the statute under which they were convicted as unconstitutionally vague and are denied standing to make that challenge because their defense at trial was that they were ignorant of the requirements of the statute—especially where it is implicit in the verdict that the jury rejected the ignorance defense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 5(a), Securities Act of 1933, 15 U.S.C. § 77e(a):

"Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Sections 4(1) and 4(2), Securities Act of 1933, 15 U.S.C. §§ 77d(1) and (2):[1]

"The provisions of section 77e of this title shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer, transactions by an issuer not involving any public offering; . . .

* * *

"(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders."

Section 2(11), Securities Act of 1933, 15 U.S.C. § 77b(11):

"The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the

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[1] This is as the Statute read prior to amendment in 1964. The 1964 amendment renumbered § 4(2) to § 4(4) and revised it to read: "[B]rokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders." We refer to the pre-1964 version throughout—the Statute as it read during the period of the alleged conspiracy.

distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking, but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

STATEMENT OF THE CASE[2]

Petitioners were charged in a nineteen count indictment (66 Cr. 720, S.D.N.Y.) with eighteen counts of selling and one count of conspiring to sell unregistered common stock of Continental Enterprises, Inc. ("Continental")— an unlisted company—in violation of Section 5 of the Securities Act of 1933. Continental was the licensee of a new promotional product—Propel-Pak. Petitioner Wolfson was neither an officer nor director of the company. He was, however, its largest shareholder. In 1954, Mr. Wolfson had acquired shares of Continental as his pro rata portion of a distribution of stock by another corporation (Tr. 1951-52). Between August 1, 1960 and January 3, 1962,[3] to raise money for other purposes, he had sold 404,150 of

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[2] References to the appellants' (petitioners here) Appendix and Supplemental Appendix in the Court of Appeals are denoted by "A" preceding the page reference; references to the typewritten transcript are denoted as "Tr."

[3] The Government stipulated that the period of the alleged conspiracy was January 1, 1960 to January 31, 1962 (Tr. 214). It was also stipulated that at all relevant times there were 2,510,000 shares of Continental issued and outstanding (Tr. 217).

these shares through six brokers, all of whom were members of the New York Stock Exchange. No registration statement was in effect as to these shares. All of the sell orders for these trades were relayed to the brokers by Petitioner Gerbert, a director of Continental.[4]

Prior to trial, petitioners moved to dismiss the indictment on the ground that no offense was stated. They argued that Section 5 does not prohibit a controlling person from selling unregistered stock when such a person is not an "issuer, underwriter or dealer" and when the broker involved acts solely as a broker and not as an underwriter. The Court denied the motion, holding that at trial the petitioners "may be found to be controlling persons who used underwriters to distribute stock to the public, or to be themselves underwriters." (Appendix C, p. C-10, *infra.*) The motion was renewed, unsuccessfully, at the close of the Government's case and at the close of the evidence (Tr. 1131-66, 2283-85).

At the trial, petitioners did not dispute the fact that Continental stock was sold or that it was not registered. Rather, they contended that they believed the registration requirements did not apply to stock of unlisted companies, such as Continental, and went on to demonstrate that their past experience and contact had been only with listed companies. Petitioners testified to their belief that there were no restrictions on the sale of their own stock if the company was not listed

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[4] Petitioner Gerbert had engaged in the sale of some of his own stock during the period mentioned above, but none of the substantive counts of the indictment concerned those shares. Petitioner Gerbert was brought into the substantive counts of the indictment by the Aiding and Abetting Statute, 18 U.S.C. § 2.

on a stock exchange (*e.g.*, Tr. 1750, 1843, 2126, 2132, 2133-34, 2200-03, 2219-20).[5] They contended that if such confusion existed, any violation of Section 5 which may have occurred would not have been wilful—an essential element of the crime charged. The Government characterized petitioners' defense not as confusion over the applicability of the registration provisions, but as total ignorance of the existence of those provisions. In rebuttal, the Government attempted to prove knowledge of the existence of the registration provisions.[6]

Petitioners also contended that Section 5 on its face did not apply to their transactions. This contention was first raised in the pretrial motion mentioned above and was renewed throughout the trial (Tr. 1131-66, 2283-85). In essence, petitioners argued that their transactions were exempt under Section 4(1) because

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[5] Their testimony indicated that they apparently had confused the registration provisions of the 1933 Act with the registration provisions of Section 12 and the filing requirements of Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78l, 78p, as the latter read at the time of the transactions. The subsequent 1964 amendments made these sections applicable to certain over-the-counter stocks, including Continental.

[6] It did this by offering Government Exhibits 17 and 21 into evidence. The exhibits were of crucial importance on the question of wilfulness. Neither exhibit involved nor was in any way connected to Mr. Gerbert, yet both were admitted against him over objection. The jury was not instructed that they were not to consider these exhibits in regard to Mr. Gerbert. On appeal, it was urged that the admission of the exhibits was reversible error as to Mr. Gerbert, but the decision of the Court of Appeals in no way touched on this contention. The point was urged again in a petition for rehearing, which was summarily denied. See Appendix B, p. B-1, *infra*. Should Certiorari be granted, we intend to urge that admission of these exhibits as against Mr. Gerbert was so prejudicial that he was denied a fair trial and meaningful appellate review.

petitioners were not issuers, underwriters, or dealers. They also argued that the brokers' transactions were exempt under Section 4(2) (now 4(4)) and that therefore the brokers were not underwriters.[7] The Court did not charge the jury concerning whether or not petitioners were issuers, underwriters or dealers. Concerning brokers, the Court, in accord with the Government's theory (A242-43), charged as follows:

> "For the purpose of this case you cannot find that a particular sale of unregistered Continental stock by the defendant was illegal unless that sale was made through an underwriter." (A119)
>
> * * *
>
> "The government contends that Louis Wolfson was a controlling person of Continental Enterprises and that the various brokers through whom he sold his stock acted as underwriters.
>
> "If you find that Louis Wolfson was in control of Continental and the brokers through whom he sold the Continental acted as underwriters you must then decide whether Wolfson's sales were part of a distribution. If they were part of a distribution the transactions were not exempt from the registration requirements of the Securities Act of 1933.
>
> "Similarly, the same rule would apply to Gerbert, who occupied a managerial relationship with the company." (A119-20)

The jury returned a verdict of guilty on all counts against both petitioners. Mr. Wolfson was sentenced to concurrent prison terms of one year on each count,

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[7] At the trial all brokers questioned on the subject testified that the sales of Continental stock were made through them in regular brokerage transactions at normal stock exchange commissions and without solicitation of orders. (Tr. 621, 666, 690-91, 716, 745-46, 849, 863-65, 974-75.)

to pay fines of $100,000, and to pay the costs of prosecution (A201). Mr. Gerbert was sentenced to concurrent terms of six months on each count and to pay fines of $50,000 (A203).

On petitioners' appeal the judgments of conviction were affirmed. The Court of Appeals held that petitioners were not exempt under Section 4(1) because that section exempts only transactions, not persons. The Court held further that Mr. Wolfson was a controlling person and, therefore, the brokers selling for him themselves became "underwriters" as defined by Section 2(11) of the 1933 Act. The Court then stated: *"In short, the brokers provided outlets for the stock of issuers and thus were underwriters . . . . Wherefore the stock was sold in 'transactions by underwriters' which are not within the exemption of § 4(1). . . ."* (Appendix A, p. A-4, *infra*; emphasis added.)[8] The Court of Appeals also rejected the contention that the transactions were not by underwriters by virtue of the fact that the brokers were exempt under Section 4(2) (now 4(4)), holding *"that § 4(4) was designed only to exempt the brokers' part in security transactions. . . . Control persons must find their own exemptions."* (Appendix A, pp. A-4 to A-5, *infra*; emphasis added.)

The Court held that petitioners lacked standing to assert that Sections 4 and 5 were unconstitutionally vague as applied to them and so did not consider the contention:[9]

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[8] The Court found it was clear that petitioners' sales involved a "distribution." (Appendix A, p. A-5, *infra*.)

[9] The vagueness contention was made to the District Court (Tr. 2705-06) but was rejected. The Court of Appeals did briefly consider, and reject, petitioners' further contention that the concept of "control" in the securities laws is void for vagueness. (Appendix A, p. A-6, *infra*.)

> "The appellants' argument that §§ 4 and 5 of the Act are unconstitutionally vague does not call for extended discussion. It will suffice to say that the appellants' defense was not that they misunderstood or misinterpreted the statute but that it was beneath their notice and they knew nothing about it. Under these circumstances we need say no more than that any possible uncertainty in the statute need not trouble us now. There will be time enough to consider that question when raised by someone whom it concerns. *United States* v. *Re*, 336 F.2d 306, 315 (C.A. 2, 1964), *cert. denied* 379 U.S. 904 (1964), and cases cited." (Appendix A, p. A-6, *infra.*)

In their petition for rehearing, petitioners argued that it was error to deny petitioners' standing to challenge as unconstitutionally vague the very provision under which they had been convicted. The petition for rehearing was denied. (Appendix B, p. B-1, *infra.*)

REASONS FOR GRANTING THE WRIT

I. THE ISSUES CONCERNING THE APPLICATION AND VAGUENESS OF SECTIONS 4 AND 5 OF THE SECURITIES ACT OF 1933

A. The Meaning and Application of Sections 4 and 5

1. The Section 5 registration provision is "the heart of the Securities Act of 1933." Note, 78 Harv. L. Rev. 1635 (1965). See also I Loss, *Securities Regulation* 180-81 (2d Ed. 1961). "Indeed, except for the general antifraud provision in § 17, and its civil liability analogue in § 12(2), all the other provisions of the act serve merely to implement § 5." (*Id.*) One of these provisions, of course, is Section 4.

The judgment of the Court below represents the only judicial decision since the passage of the Se-

curities Act of 1933 holding that the Act prohibits the sale of stock through a broker by a controlling person who is not himself an issuer, underwriter, or dealer.[10] The District Judge himself recognized both the importance and the novelty of the issue:

> "[I]f this law has been on the books for so long why hasn't this very important and troublesome question been finally and authoritatively adjudicated long before this?" (A241)

The impact of the decision below is not by any means limited to this case. It is a test case, as the District Judge noted (A241). It directly affects the marketing of securities owned by officers, directors and other controlling persons of the vast majority of corporations whose shares are publicly traded in the United States. Moreover, the case is not limited to the arena of criminal liability. Violation of Section 5 gives rise to civil liability under Section 12(1), 15 U.S.C. § 77l(1). Thus, the decision places in jeopardy of both criminal and civil liability any controlling person who sells his stock through brokers in normal brokerage transactions. The proper interpretation of Section 5 in the context here, then, presents a question of federal law of great public importance which should be settled by this Court.

2. The decision below is, we submit, erroneous. The transactions here were exempt under both Sections 4(1) and 4(2).

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[10] An earlier district court decision had considered the issue—and reached a conclusion contrary to that of the Court of Appeals. See *Value Line Fund* v. *Marcus*, 1964-1966 CCH Fed. Sec. L. Rep. ¶ 91,523 (S.D.N.Y. 1965).

The Language of the Act.—Section 4(1) exempts from Section 5 "Transactions by any person other than an issuer, underwriter, or dealer. . . ." For the purposes of this Section, only a company, such as Continental, can be an issuer. See 15 U.S.C. § 77b(4); *Value Line Fund* v. *Marcus,* 1964-1966 CCH Fed. Sec. L. Rep. ¶ 91,523 at p. 94,972 (S.D.N.Y. 1965). Clearly, too, petitioners were not dealers. See 15 U.S.C. § 77b(12). Finally, there was no assertion by the Government at trial that petitioners were underwriters. Indeed, the theory of the prosecution (*e.g.,* A242-43), of the charge to the jury (A119-20), and of the Court of Appeals (Appendix A, p. A-4, *infra*) was that the *brokers* here were underwriters, that the stock was sold in "transactions by underwriters," and that therefore the sales were not exempt. This involuted theory is not supported by the language of the Statute.

Petitioners' transactions—the sales for which they were indicted—*were* "transactions by any person other than an issuer, underwriter, or dealer" and, accordingly, were exempt from Section 5 under the plain words of Section 4(1). This answers, we think, the Court of Appeals' conclusion "that § 4(1) by its terms exempts only 'transactions,' not classes of persons . . . ." (Appendix A, p. A-4, *infra.*) If Congress had meant to punish sales by a controlling person made "through" an underwriter, it could easily have done so. It did not, and the Court of Appeals' artificial construction of plain words cannot stand—especially in an effort to uphold, for the first time, a criminal conviction. *United States* v. *Weitzel,* 246 U.S. 533, 543 (1918); *United States* v. *Boston & M.R. Co.,* 380 U.S. 157, 160 (1965); *United States* v. *Laub,* 385 U.S. 475, 486 (1967).

Even assuming sales by a controlling person are not exempt under Section 4(1) insofar as the controlling person is concerned, the transactions here were entitled to the brokerage exemption. The undisputed fact, shown by the testimony of every broker who testified on the subject, was that the brokers had engaged only in normal broker's transactions and had collected no more than the usual commission.[11] Section 4(2) specifically exempts from Section 5 "brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders." [12]

The Court of Appeals apparently conceded in its opinion that the brokers here were exempt under Section 4(2) (now 4(4)). But it added *"that § 4(4) was designed only to exempt the brokers' part in security transactions. Stadia Oil & Uranium Co.* v. *Wheelis,* 251 F.2d 269, 275 (C.A. 10, 1957). *Control persons must find their own exemptions."* (Appendix A, pp. A-4 to A-5, *infra*; emphasis added.) But, as demonstrated above, the control persons here *did* find their own exemptions—in the plain words of Section 4(1).[13] And as to the brokers' exemption, we do not claim that anyone other than a broker can claim it; rather,

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[11] Tr. 621, 666, 716, 974-75. Indeed, some of the brokers further testified explicitly that they had not acted as "underwriters." (Tr. 690-91, 745-46, 863-65.)

[12] There is no dispute that the brokers did not solicit orders from petitioners. (Appendix A, p. A-4, n.1, *infra.*)

[13] The Court's reliance on *Stadia* underscores the fundamental error in its theory of the interplay of Sections 4 and 5. In *Stadia,* the seller (the analogue of petitioners here) *was itself an issuer.* 251 F.2d at 275. As such, it was specifically not exempted from Section 5 by Section 4 of the Act. Accordingly, the Court in *Stadia* held that an issuer could not secure exemption for itself by selling through an exempt broker. The Court said: "Stadia, an issuer, cannot escape liability under the Act by having its securities sold

we urge that exempt brokers' transactions are, by definition, not underwriters' transactions.[14] Therefore, there has been no sale through an underwriter, and the transaction is exempt. The legislative history of the 1933 Act underscores the intent of Congress in this regard:

> "[Section 4(2)] exempts the ordinary brokerage transaction. *Individuals* may thus dispose of their securities according to the method which is now customary *without any restrictions imposed either upon the individual or the broker.*" H.R. Rep. No. 85, 73d Cong., 1st Sess., p. 16 (1933) (emphasis added).

The Commission's Own Contemporaneous Construction of the Act.—From the passage of the Securities Act of 1933 until 1946, Section 4(2) was construed as we suggest, so as to permit the unregistered sale of

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through a broker." *Id.* Thus, *Stadia* properly precludes a person subject to Section 5 of the Act because he is an issuer, underwriter, or dealer from bootstrapping an exemption by handling his transactions through a broker. In the present case, in contrast to *Stadia*, it is undisputed that petitioners were *not* issuers, underwriters or dealers and, therefore, they had their own exemption under Section 4(1).

[14] See P.L.I., *S.E.C. Problems of Controlling Stockholders and in Underwritings* 49 (C. Israels Ed. 1962):

> "On the first point, it can be argued that if the broker is exempt he must be treated as a broker and he cannot be an underwriter under Section 2(11). It can be argued that the two concepts are mutually exclusive, and if this is so, then the controlling seller cannot be an issuer under Section 2(11) and thus the transaction is completely exempt under the first part of Section 4(1). That is the view expressed by Professor Loss, when he says:
>
> "'Although the rule [Rule 154] is expressly directed at § 4(2), it was obviously contemplated that the seller's part of the transaction would be considered to be exempt under the first clause of § 4(1) whenever the broker's part came within the rule.' [I Loss, *Securities Regulation* 705, n.178 (2d ed. 1961).]"

stock by controlling persons through brokers, so long as such brokers performed only the usual and normal function. This was clearly the Commission's original understanding of the Act, as shown in the discussion by the General Counsel and Assistant General Counsel of the Commission, Throop & Lane, *Some Problems of Exemption Under the Securities Act of 1933,* 4 Law & Contemp. Prob. 89, 125-27 (1937). It was the understanding until 1946, as shown by the SEC's orders in *United Corporation,* Holding Company Act Rels. 6337 (1945), 6409 (1946), 6649 (1946). These orders granted exemptions for the sale without registration by a controlling person of 600,000 shares of common stock through brokers. As Professor Loss has stated (I Loss, *supra,* at 701):

> "Since there was clear control and no registration statement had been filed under the Securities Act, it was obvious from the Commission's silence that exemption was assumed under Sections 4(1) and 4(4)."

Thus, the Commission had adopted the construction we urge. It subsequently reversed this interpretation of thirteen years' seniority in *Ira Haupt & Co.,* 23 S.E.C. 489 (1946), explicitly stating that it was "overruling" the interpretation it had followed since 1933. (23 S.E.C. at 604-06.) [15] The *Ira Haupt* decision prompted vigorous objection on the part of the leaders of the securities industry. The presidents of both the New York and American Stock Exchanges were critical of the decision, and the president of the New York Exchange testified as follows:

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[15] The *Ira Haupt* decision involved a proceeding against a registered broker-dealer in which an administrative sanction was imposed. There was no holding in the case that the controlling shareholder violated Section 5.

> "It is the position of myself and other representatives of the securities industry that this restrictive interpretation of the exemption granted by the Congress is not correct, cannot be clarified without expensive litigation, and should therefore be made definite and certain by the expression of the exemption in unequivocal terms. We believe that, when Congress said that transactions effected by brokers pursuant to unsolicited orders should be exempt, it meant the exemption to apply to all such orders and implied no such dual caveat as the Commission engrafted upon the statute, first in *Ira Haupt & Company,* Securities Exchange Act of 1934, Release No. 3845, August 21, 1946 . . . ." Staff of Securities and Exchange Commission Subcomm., House Comm. on Interstate and Foreign Commerce, 82d Cong., 2d Sess., Study of the Securities and Exchange Commission 142-43 (Subcomm. Print 1952).

In 1954, the Securities and Exchange Commission partially receded from its *Ira Haupt* interpretation. This was accomplished through the enactment of Rule 154, 17 C.F.R. § 230.154, which involved an administrative interpretation of the exemption provided by the term "broker's transaction" in Section 4(2) of the Securities Act.[16] Rule 154 exempted sales up to one

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[16] In addition to defining the role of the "broker" in terms of the usual and customary broker's function as distinguished from the solicitation of transactions, the Rule also specified that the broker must not be aware that his principal is an "underwriter" or that the transactions are part of a "distribution." Distribution is defined in Section (b) of the Rule as not involving an "amount not substantial in relation to the number of shares or units of the security outstanding." The term "distribution" was further specifically defined, with respect to over-the-counter companies such as Continental Enterprise, to exclude sales within a six-month period of approximately one percent or less of the shares or units of such security outstanding at the time of the receipt by the broker of the order to complete the transaction.

percent of the issuer's outstanding shares unconditionally, so that a controlling person of an issuer could dispose of his stock holdings in normal brokers' transactions without registration in amounts up to one percent, as had been the case prior to 1946. The Rule left untouched the holding of *Ira Haupt* as to sales over one percent. The propriety of such sales obviously would have to be determined as before by construction of the Statute. The Rule sought in a limited way to avoid a confrontation between the pre-*Haupt* doctrine and the post-*Haupt* doctrine as to the meaning of Section 4(2) (now 4(4)) as applied to brokers.

Until now no court has confirmed the Commission's about-face interpretation of the exemption for brokerage transactions provided by Section 4(2) of the Act. And certainly no court nor even the Commission itself has ever held that a controlling person violates the law when he sells in normal brokerage transactions. This case presents the first opportunity on the part of this Court to resolve the interpretation of a basic part of the Securities Act of 1933.[17]

Clearly, the *Ira Haupt* doctrine is an attempt to change the law; it should be rejected absent congressional action. Where an administrative agency completely reverses its earlier interpretation of a statute, the Court owes deference only to the views which were contemporaneous with the enactment of the statute and followed for thirteen years thereafter. See *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396-97 (1956); *New York Central Railroad Co.* v. *United States*, 267 F. Supp. 619, 624-25 (S.D.N.Y. 1967). Especially is

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[17] Professor Loss, in I *Securities Regulations, supra,* at 706, refers to this as "a very fuzzy area . . . where a criminal prosecution is inconceivable as a practical matter."

this the case where the reversal of the interpretation was not based on the theory that the original interpretation was in error, but rather on the theory that a change in the character of the market required a revision of the result. See *Ira Haupt & Co., supra,* 23 S.E.C. at 605. This was clearly an invasion of the Congressional prerogative to consider when changed circumstances require repeal or revision of legislative exemptions. We have urged the contemporaneous construction of Section 4 "by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U.S. 294, 315 (1933). The recent and novel view presented here should be rejected—especially in a criminal case. See *Bouie* v. *City of Columbia,* 378 U.S. 347, 352 (1964).

B. The Unconstitutional Vagueness of Sections 4 and 5 as Applied to Petitioners

1. We have set out in Part I A 1, *supra,* pp. 9-10, why we think the interpretation and application of Sections 4 and 5 pose a question appropriate for review by this Court. The same considerations indicate that it is in the public interest for the Court to settle the question whether Section 5, as implemented by Section 4, is unconstitutionally vague.

2. The Court should decide whether, for the purposes of a criminal case, Sections 4 and 5 are (a) too vague to serve as an objective guide to fair adjudication; and (b) too vague to give fair notice and warning of the required conduct.

(a) *Section 5 as implemented by Section 4 is unconstitutionally vague in that it is insufficiently definite to serve as a guide to fair adjudication.*

In *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952), this Court held:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, *and to guide the judge in its application and the lawyer in defending one charged with its violation.*" (Emphasis added.)[18]

The application of *Boyce* to the present case is striking. *Boyce* held that a criminal statute must be sufficiently definite to guide both "the judge in its application and the lawyer in defending one charged with its violation."[19]

—As to the judge, note that the District Court in the present case said:

> "Wouldn't you agree Mr. Armstrong, that the statute could have been a little more felicitously

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[18] And see Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77-78 (1948):

"It may be accepted as a premise that due process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.

"Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness; a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same—to test application of rules to particular situations."

[19] See also *Beauharnais* v. *Illinois*, 343 U.S. 250, 264 (1952); *United States* v. *Bel-Mar Laboratories, Inc.*, 284 F. Supp. 875, 880 (E.D.N.Y. 1968).

phrased than it was? Why get into this whole theory about whether the broker infects it by being an underwriter? *Why place upon the trial judge the very heavy burden that I will have in trying to explain this to a lay jury when it could have been set out very, very clearly in terms of the Act's purposes?*" (A244; emphasis added.)

—As to the lawyer, note that the same Court said:

"But their [petitioners'] attorneys say, and I think not without a great deal of persuasiveness, two things that are troublesome. No. 1, they say this in effect is a test case, and one can't help asking one's self as a lawyer if this law has been on the books for so long why hasn't this very important and troublesome question been finally and authoritatively adjudicated long before this?

"Isn't the fact that there has been this long silence itself an indication that the law was lacking either in its explicit provisions or lacking in its terms so as to make it readily enforceable?" (A241)

Thus, the remarks of the trial judge underscored "the very heavy burden" placed on him "in trying to explain this [the interplay of the provisions] to a lay jury. . . ." (A244) They indicate, too, the impossible task faced by petitioners' counsel in attempting to fashion a defense to alleged violations of a statute so imprecise as to admit of two perfectly contradictory intepretations by the administrative agency charged with the statute's application. See the discussion of the *Ira Haupt* decision, *supra,* pp. 14-16.

Counsel have contended from the outset that the statute was too vague. They made a pretrial motion to dismiss the indictment on the ground that no offense was stated. It was denied. (Appendix C.) At the close

of the Government's case, counsel made their position more emphatic:

> "Now, we must know what the theory is upon which we are to proceed with our defense." (Tr. 1134)
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> * * *
>
> "There have been no cases, this is the first case in the entire history of the Securities Act that we have been able to find where a controlling stockholder has been told that his sale of shares may violate the Securities Act." (Tr. 1135)
>
> * * *
>
> "I say, your Honor, that decision [the *Value Line* case, *supra*] by a learned justice of this Court governs this case, and if your Honor is to disagree with that case we are entitled to know it, we are entitled to know the theory upon which there is disagreement so that we may prepare our defense to meet that argument." (Tr. 1137-38)

It was not until *both sides* had rested that defense counsel were informed of the theory of the case—that the Court would charge the jury "that the defendants' transactions were not exempt because the brokers through whom they sold were underwriters. . . ." (Tr. 2285) "The result of leaving the issue so at large was that, as the case was tried, the defendant did not know even at the end of the government's case what he had to meet. . . ." *United States* v. *Remington,* 191 F.2d 246, 250 (2d Cir. 1951), *cert. denied,* 343 U.S. 907 (1952).

> (b) *Section 5 as implemented by Section 4 is unconstitutionally vague in that it is insufficiently definite to give fair notice and warning of the required conduct.*

In *United States* v. *Cardiff,* 344 U.S. 174, 176-77 (1952), this Court stated:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining *what persons are included* or what acts are prohibited. . . . We cannot sanction taking a man by the heels for refusing to grant the permission which this Act *on its face apparently* gave him the right to withhold. That would be making an act criminal without fair and effective notice." (Emphasis added.)

Precisely that has happened here, both as to Section 4(1), and as to the broker's exemption, Section 4(2). The trial judge himself noted:

> "Behind the statute one must look at a specific provision and when the attorneys call your attention to the specific provision it would seem as though the defendants specifically complied with those provisions." (A241)

He wondered whether "the statute could have been a little more felicitously phrased than it was?" (Tr. 1157) These comments only underscore what everyone knows: "The statutory and administrative regulatory scheme over this area is far from a model of clarity. . . ." *United States* v. *Crosby,* 294 F.2d 928, 942 (2d Cir. 1961), *cert. denied,* 368 U.S. 894 (1962). See also I Loss, *supra,* p. 180. *Crosby* went on to say, "such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law." (294 F.2d at 942.)

The registration provisions of the Securities Act should be judged according to the "picture" they "evoke in the common mind." *McBoyle* v. *United States,* 283 U.S. 25, 27 (1931). Under that test, "it would seem as though the defendants specifically complied with those provisions" (Tr. 1152). If they have not, the Statute has not given fair warning.

As to the broker's exemption provided by Section 4(2), the trial court remarked:

> *"They were acting through brokers, the brokers executed the customer's orders or the authorized agent of the customer's and therefore they complied with the specific terms of the statute.* So that one is forced to ask one's self what kind of statute is this? It flags an intention, it proclaims a very beneficent intention of protecting the investing public and then in its provisions *it says to a particular defendant or a person in his position, you deal through a broker and he acts on your orders, you are not covered by this provision."* (A241-42; emphasis added.)

Thus, here, as in *United States* v. *Cardiff, supra,* the Court is faced with a statute which "on its face apparently gave . . . the right" to act in a way the Government now seeks to punish. Such punishment, we submit, results in "making an act criminal without fair and effective notice." *United States* v. *Cardiff, supra,* 344 U.S. at 176-77.

As we have pointed out in our discussion of the *Ira Haupt* case, the broker's exemption provided by Section 4(2) has been subject to two diametrically opposed administrative constructions. Where "men of common intelligence must necessarily guess at its meaning and differ as to its application," a penal statute "violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). The Commission, we submit, has always been composed of "men of common intelligence." And, as we have shown, even it has had to guess at the meaning of Section 4(2)—and has differed as to its application.

II. THE QUESTION OF PETITIONERS' STANDING TO ATTACK THE VAGUENESS OF SECTION 5 AS IMPLEMENTED BY SECTION 4

1. As we noted above, petitioners contended on appeal that Section 5, as implemented by Section 4, was unconstitutionally vague.[20] The Court of Appeals held that petitioners' defense at trial had been that they knew nothing about the Statute and that, for this reason, they did not have standing to challenge it as being unconstitutionally vague. The Court said: "Under these circumstances we need say no more than that any possible uncertainty in the statute need not trouble us now. There will be time enough to consider that question when raised by someone whom it concerns." (Appendix A, p. A-6, *infra.*) The Court thus held that a defendant cannot attack as unconstitutionally vague the very provision under which he is charged, tried and convicted, if his defense at trial is that he was ignorant of that provision. This holding is in direct conflict with applicable decisions of this Court. See, *e.g., Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340 (1952), quoted at p. 18, *supra.* As *Boyce* makes abundantly clear, "one charged with [a criminal statute's] violation" must, of necessity, always have standing to attack it as being too vague to guide his lawyer and the judge and jury—else the mandate of *Boyce* would be utterly meaningless.

The decision of the Court below is also in clear conflict with the recent decision of the Court of Appeals for the District of Columbia in *Ricks* v. *United States,* No. 20,919A (D.C. Cir., December 23, 1968) (Appendix D, pp. D-1 to D-15, *infra*). *Ricks* explicitly held that

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[20] The contention was also made to the District Court (Tr. 3705-06).

appellants had standing to attack the statute under which they were convicted as vague where, among other things, appellants contended that the ambiguities in the statute left "judicial officers free to assess their guilt solely on the basis of conjecture" (Appendix D, p. D-6, *infra*). The Court granted standing and found the statute too vague to enable "administrators or jurists to confidently make applications." (*Id.*, p. D-8.)[21]

The decision below not only conflicts directly with applicable decisions of this Court and with a decision of another Court of Appeals, but does so in an area of broad reach in the administration of criminal justice. As we read the decision, it holds squarely that once a criminal accused asserts the defense that he was ignorant of a statute's proscription, he loses standing to argue that the statute is so vague that he cannot be adequately defended[22] and fairly tried under it. This Court should resolve the conflict presented by this decision. This is particularly true where, as here, the jury has apparently *rejected* the defendants' contention and thus may well have found that they did in fact know of the statutory requirements.

2. The decision of the Court below is clearly erroneous. As *Boyce* makes clear, an adjudicative as well as a notice function is fulfilled by the requirement of definiteness. A statute must be sufficiently definite to

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[21] And in *Ricks*, as here, the Government had contended that appellants were attempting to " 'attack the statute on the ground that its language might permit it to be applied in an unconstitutional manner to other people in hypothetical situations not involved in the instant case.' " (Appendix D, p. D-5, *infra*.)

[22] For this reason, we think, the decision of the Court below also raises problems of right to counsel under the Sixth Amendment. *Cf. United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).

serve as an objective guide to fair adjudication. This requirement must be satisfied without regard to the accused's knowledge of a particular statute at the time he acted, if he is subject to conviction for violating it. Surely, any defendant has standing to argue that a statute is not sufficiently definite to enable the judge or jury to make an objective determination of his guilt, or to enable his counsel to prepare an adequate defense. Until now, no court has ever held otherwise. The Court below apparently made the mistake of assuming that there is only one test—whether the statute functions to give fair notice of the required conduct—governing the question whether a criminal statute is sufficiently definite.[23]

The cases relied upon by the Court of Appeals are not in point. Each of them presented a situation where a defendant attacked as vague, portions of a statute under which he was *not* charged, the portions of the same statute under which he *was* charged being clear. Thus, *United States* v. *Re,* 336 F.2d 306, 315 (2d Cir.), *cert. denied,* 379 U.S. 904 (1964), cited by the Court of Appeals, involved a contention by defendants that they had acted as *specialists,* and that certain portions of the securities laws presented " 'an inconsistent, vague and confusing statutory scheme which fails to give adequate warning to a *specialist* of what he can and cannot do.' "

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[23] Even if the notice function were the only one it would be incorrect to hold that one who "knew nothing about" a criminal statute lacked standing to attack its vagueness. Had the statute been sufficiently definite, the accused might have known about it. See Note, *supra,* 62 Harv. L. Rev. at 79-80: "[I]f a man is to be charged with knowledge of all his rights and duties under a statute regardless of whether he has read or understood it, fundamental fairness requires that he be given at least the opportunity to discover its existence. . . ."

336 F.2d at 314 (emphasis added). But, it was "inherent" in the jury's verdict in *Re* that the defendants "were not performing the function of specialists," and it was not argued that the applicable securities laws were "unconstitutionally vague as applied to non-specialists, a theory previously rejected in this circuit." 336 F.2d at 314, 315. Thus the court in *Re* could well rely on *United States* v. *Wurzbach,* 280 U.S. 396,399 (1930), and its holding that "[t]he objection to uncertainty concerning the persons embraced need not trouble us now. * * * [I]t will be time enough to consider it when raised by someone whom it concerns." *Wurzbach,* like *Re,* involved an attack on provisions of a statute not applicable to the defendant. There a Representative of the House argued that the Federal Corrupt Practices Act was uncertain and vague as to the persons embraced, yet the Act specifically referred to a "Representative in . . . Congress. . . ." Thus, there was "no doubt that the words include representatives. . . ." As to the contention aimed at the more ambiguous categories of persons the Court held "it will be time enough to consider it when raised by someone whom it concerns." *Wurzbach, supra,* at 399. The other cases relied on in *Re* are similarly inapplicable to the situation presented here. See *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Dennis* v. *United States,* 341 U.S. 494, 516 (1951).

All these cases hold only that one cannot attack vague provisions of a statute if they do not concern him. But none of those cases—nor, indeed, any case—holds that an accused lacks standing to attack as too vague to serve as a guide to a fair adjudication, the very provisions under which he is convicted, simply because he may have been ignorant of those provisions when he acted.

CONCLUSION

For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

Of Counsel:

ARNOLD & PORTER
JAMES E. KRIER
HOGAN & HARTSON
AUSTIN S. MITTLER
Washington, D. C.

Dated: February 17, 1969

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 411—September Term, 1967

(Argued April 4, 1968 Decided December 27, 1968.)
Docket No. 31993

UNITED STATES OF AMERICA,

—v.— *Appellee,*

LOUIS E. WOLFSON and ELKIN B. GERBERT,
Defendants-Appellants.

Before:

MOORE, WOODBURY* and SMITH,
Circuit Judges.

Appeal from judgments of conviction entered in the District Court for the Southern District of New York, Palmieri, *J.*

Affirmed.

CHARLES P. SIFTON, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, David M. Dorsen, Jay Gold, Lars I. Kulleseid and Abraham D. Sofaer, Assistant United States Attorneys, of counsel), *for appellee.*

WILLIAM O. BITTMAN and MILTON V. FREEMAN (Shea, Gallop, Climenko & Gould of New York, N. Y., Arnold & Porter of Washington, D. C., Milton S. Gould and Ronald H. Alenstein on brief), *for appellants.*

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* Of the First Circuit, sitting by designation.

Appeals from judgments of conviction and sentence entered in the United States District Court for the Southern District of New York, Palmieri, *J.*, on jury verdicts of guilty as charged in an indictment charging the defendants in eighteen counts with selling and in one count with conspiring with one another and with others not indicted to sell a substantial block of stock owned by them and members of the Wolfson family in Continental Enterprises, Inc., without registration in violation of § 5(a) of the Securities Act of 1933, 48 Stat. 77, 15 U. S. C. § 77e(a).

AFFIRMED.

WOODBURY, *Senior Circuit Judge:*

It was stipulated at the trial that at all relevant times there were 2,510,000 shares of Continental Enterprises, Inc., issued and outstanding. The evidence is clear, indeed is not disputed, that of these the appellant Louis E. Wolfson himself with members of his immediate family and his right hand man and first lieutenant, the appellant Elkin B. Gerbert, owned 1,149,775 or in excess of 40%. The balance of the stock was in the hands of approximately 5,000 outside shareholders. The government's undisputed evidence at the trial was that between August 1, 1960, and January 31, 1962, Wolfson himself sold 404,150 shares of Continental through six brokerage houses, that Gerbert sold 53,000 shares through three brokerage houses and that members of the Wolfson family, including Wolfson's wife, two brothers, a sister, the Wolfson Family Foundation and four trusts for Wolfson's children sold 176,675 shares through six brokerage houses.

Gerbert was a director of Continental. Wolfson was not, nor was he an officer, but there is ample evidence that nevertheless as the largest individual shareholder he was Continental's guiding spirit in that the officers of the corporation were subject to his direction and control and that no corporate policy decisions were made without his knowl-

edge and consent. Indeed Wolfson admitted as much on the stand. No registration statement was in effect as to Continental; its stock was traded over-the-counter.

The appellants do not dispute the foregoing basic facts. They took the position at the trial that they had no idea during the period of the alleged conspiracy, stipulated to be from January 1, 1960, to January 31, 1962, that there was any provision of law requiring registration of a security before its distribution by a controlling person to the public. On the stand in their defense they took the position that they operated at a level of corporate finance far above such "details" as the securities laws; as to whether a particular stock must be registered. They asserted and their counsel argued to the jury that they were much too busy with large affairs to concern themselves with such minor matters and attributed the fault of failure to register to subordinates in the Wolfson organization and to failure of the brokers to give notice of the need. Obviously in finding the appellants guilty the jury rejected this defense, if indeed, it is any defense at all.

The appellants assert numerous claims of error. We shall dispose of the claims more or less in the order of their importance.

Section 5 of the Act, 15 U. S. C. § 77e, in pertinent part provides: "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

> "(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise;. . . ."

However, § 4 of the Act, 15 U. S. C. § 77d, exempts certain transactions from the provisions of § 5 including:

> "(1) Transactions by any person other than an issuer, underwriter, or dealer."

The appellants argue that they come within this exemption for they are not issuers, underwriters or dealers. At first blush there would appear to be some merit in this argument. The immediate difficulty with it, however, is that § 4(1) by its terms exempts only "transactions," not classes of persons, see *SEC* v. *Culpepper,* 270 F. 2d 241, 247 (C. A. 2, 1959), and ignores § 2(11) of the Act which defines an "underwriter" to mean any person who has purchased from an issuer with a view to the distribution of any security, or participates directly or indirectly in such undertaking unless that person's participation is limited to the usual and customary seller's commission, and then goes on to provide:

> "As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly *controlling* or controlled by *the issuer,* or any person under direct or indirect common control with the 'issuer.'" (Italics supplied.)

In short, the brokers provided outlets for the stock of issuers and thus were underwriters. *United States* v. *Re,* 336 F. 2d 306, 309 (C. A. 2, 1964), *cert. denied* 379 U. S. 904 (1964). Wherefore the stock was sold in "transactions by underwriters" which are not within the exemption of § 4(1), *supra.*

But the appellants contend that the brokers in this case cannot be classified as underwriters because their part in the sales transactions came within § 4(4), 15 U. S. C. § 77d(4), which exempts "brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders."[1] The answer to this contention is that §4(4) was designed only to exempt the brokers' part in security transactions. *Stadia Oil & Uranium Co.* v. *Wheelis,* 251

[1] It is undisputed that the brokers involved in this case did not solicit orders from the appellants.

F. 2d 269, 275 (C. A. 10, 1957). Control persons must find their own exemptions.

There is nothing inherently unreasonable for a broker to claim the exemption of § 4(4), *supra,* when he is unaware that his customer's part in the transaction is not exempt. Indeed, this is indicated by the definition of "brokers' transaction" in 17 C. F. R. § 230.154, commonly known as Rule 154 which provides:

> "(a) The term 'brokers' transaction' in Section 4(4) of the act shall be deemed to include transactions by a broker acting as agent for the account of any person controlling, controlled by, or under common control with, the issuer of the securities which are the subject of the transaction where:
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> • • • • •
>
> "(4) The broker is *not aware* of circumstances indicating . . . that the transactions are part of a distribution of securities on behalf of his principal."

And there can be no doubt that appellants' sale of over 633,000 shares (25% of the outstanding shares of Continental and more than 55% of their own holdings), was a distribution rather than an ordinary brokerage transaction. See Rule 154(6) which defines "distribution" for the purpose of paragraph (a) generally as "substantial" in relation to the number of shares outstanding and specifically as a sale of 1% of the stock within six months preceding the sale if the shares are traded on a stock exchange.

Certainly if the appellants' sales, which clearly amounted to a distribution under the above definitions had been made through a broker or brokers with knowledge of the circumstances, the brokers would not be entitled to the exemption. It will hardly do for the appellants to say that because they kept the true facts from the brokers they

can take advantage of the exemption the brokers gained thereby.

The appellants' argument that §§ 4 and 5 of the Act are unconstitutionally vague does not call for extended discussion. It will suffice to say that the appellants' defense was not that they misunderstood or misinterpreted the statute but that it was beneath their notice and they knew nothing about it. Under these circumstances we need say no more than that any possible uncertainty in the statute need not trouble us now. There will be time enough to consider that question when raised by someone whom it concerns. *United States* v. *Re,* 336 F. 2d 306, 315 (C. A. 2, 1964), *cert. denied* 379 U. S. 904 (1964), and cases cited.

The further argument of the appellants that the concept of "control" stock is unconsitutionally vague and indefinite was considered and rejected in *United States* v. *Re, supra* 316. And as already pointed out Wolfson himself on the stand admitted that he was in control of Continental within the ordinary and accepted meaning of that term.

The appellants assert that the government's proof is legally insufficient as to all counts, but particularly as to the substantive ones, for the reason that mere proof of the mailing of sales confirmation slips from the brokers to Wolfson or his agent was not a use of the mails "to sell" unregistered securities within the meaning of § 5(a)(1) of the Act. We do not agree.

Section 5(a)(1) quoted hereinabove categorically forbids the direct or indirect use of the mails "to sell" securities not registered as the law requires through the use or medium of any prospectus or otherwise. By this language ". . . Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause." *Schillner* v. *H. Vaughan Clarke & Co.,* 134 F. 2d 875, 878 (C. A. 2, 1943). But this court in that case in holding that delivery by mail of stock certificates to a buyer pursuant to an oral contract of sale

was within the statutory definition of "sell" in § 12 of the Act, 15 U. S. C. § 77e, by dictum conceded, page 878, that the word "sell" may have a narrower meaning in section 5 that it has in section 12." It said: "It is true that the word 'sell' in the phrase 'to make use of . . . the mails to sell' as used in subdivision (a)(1) of section 5 cannot be given a meaning broad enough to include delivery of the stock certificate after sale without making purposeless the phrase in subdivision (a)(2) 'for delivery after sale.'" Nevertheless the general rule is well established that "[W]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira* v. *United States,* 347 U. S. 1, 8, 9 (1954), citing *United States* v. *Kenofskey,* 243 U. S. 440 (1917). And it has been held in the Fifth Circuit, *McDaniel* v. *United States,* 343 F. 2d 785, 788 (C. A. 5, 1965), that use of the mails to send a confirmation of a sale to a buyer of stock constituted a use of the mails within the meaning of § 5 of the Act. It has also been so held on more than one occasion in the court below. *United States* v. *Hughes,* 195 F. Supp. 795, 799 (S. D. N. Y. 1961); *United States* v. *Greenberg,* 30 F. R. D. 164, 167 (S. D. N. Y. 1962). See also *United States* v. *Kane,* 243 F. Supp. 746, 750 (S. D. N. Y. 1965), in which the court, after pointing out that § 5(a)(1) of the Act said nothing about causation or carriage but instead made unlawful the direct or indirect *use* of the mails, said: "This subsection is violated when, in connection with the sale of such stock, the mails are used to transmit an offer or other sales literature, to transport the securities after sale, to remit the proceeds to the seller, to send confirmation slips to the buyer, and perhaps even when used in more tangential ways."

We regard this as a correct statement of the law. If anything said in *Schillner, supra,* can be read to the contrary it is to be disregarded. We see no basis upon which

to draw any distinction between confirmation of a sale of stock to a buyer and confirmation to a seller since both are essential to a valid sale.

It follows that we reject the appellants' further argument that this interpretation of § 5(a)(1) by the court below, with which we agree, erroneously gave venue in the Southern District of New York thereby forcing the defendants-appellants to defend in a district far from their homes where adverse publicity was rife. The matter of proper venue was thoroughly and carefully considered by the court below only to be rejected on the appellants' motion under Rule 21(b) Fed. R. Crim. P. for change of venue to the Middle District of Florida where the appellants had their homes. *United States* v. *Wolfson,* 269 F. Supp. 621, 623, 624 (S. D. N. Y. 1967). There was no abuse of discretion in this ruling.

We now turn to a variety of other matters which can be disposed of more summarily.

There is no merit in the appellants' claim that the grand jury selection process in the Southern District of New York is illegal. This claim has been asserted many times both in this court and in the court below and uniformly rejected. Citation of all the cases would serve no useful purpose. It will suffice to refer to *United States* v. *Kelly,* 349 F. 2d 720, 778 (C. A. 2, 1965), *cert. denied* 384 U. S. 947 (1966), and *United States* v. *Bowe,* 360 F. 2d 1, 7 (C. A. 2, 1966), *cert. denied* 385 U. S. 961 (1966). *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Coleman* v. *Alabama,* 389 U. S. 22 (1967), and *Jones* v. *Georgia,* 389 U. S. 24 (1967), upon which the appellants rely are clearly inapposite.

We find no merit in the appellants' further contention that the indictment should be dismissed because of the prosecutor's misconduct in calling upon the appellants to testify before the grand jury when he knew that on that occasion they would assert their claim of privilege under the Fifth Amendment.

The rule is well settled in this circuit that the self-incrimination clause of the Fifth Amendment does not prohibit "the Government from ever summoning before a grand jury one who has become a target of inquiry and is a 'potential' defendant." *United States* v. *Winter,* 348 F. 2d 204, 207 (C. A. 2, 1965), and cases cited, *cert. denied* 382 U. S. 955 (1965). Reaffirmed *United States* v. *Irwin,* 354, F. 2d 192, 198, 199 (C. A. 2, 1965), *cert. denied* 383 U. S. 967 (1966). And this is also the rule in the First Circuit, see *Kitchell* v. *United States,* 354 F. 2d 715, 720 (C. A. 1, 1966), *cert. denied* 384 U. S. 1011 (1966). There can be no doubt that both defendants well knew of their constitutional right to remain silent before the grand jury and exercised that right. Moreover the minutes of the proceeding before the grand jury show that the prosecuting attorney fully advised the jurors that they were to draw no inferences adverse to the defendants from their refusal to testify. Nor was the prosecuting attorney's questioning of the defendants before the grand jury in any way improper. He did no more than to test the validity of the defendants' reliance on their constitutional right to remain silent.

The appellants level a number of objections to the prosecuting attorney's summation to the jury. The trial was hotly contested throughout. Perhaps the prosecuting attorney's allusions in his argument to violent crimes, specifically bank robbery, murder and Ruby's shooting of Oswald were somewhat extreme. But counsel for the appellants went to the other extreme of likening their clients' purported offense to parking too close to a hydrant. The charge that the prosecuting attorney argued the appellants' fraud to the jury when in his opening statement he had asserted that fraud was not involved in the case is not well grounded. The prosecution did no more than argue fraud as a motive for the appellants' failure to register. On this issue evidence of fraudulent activities is relevant. *United States* v. *Abrams,* 357 F. 2d 539, 546 (C. A. 2, 1966),

cert. denied 384 U. S. 1001 (1966). The court below in suggesting that the *Abrams* case was not in point was speaking in another context. Without going into greater detail it will suffice to say that reading the prosecuting attorney's entire summation in conjunction with the court's charge discloses no reversible error.

The appellants object to the refusal of the court to admit expert testimony from a stock broker offered by them to indicate that they could have sold their stock even though a registration certificate with full disclosure had been on file. The basis for this offer is an isolated statement in the prosecutor's opening statement to the effect that had the appellants filed a registration statement they would not have been able to sell their stock. The statement of the prosecutor may perhaps have been a slip of the tongue for he actually argued to the jury that the appellants *believed* that they might not be able to sell their securities if the facts were known. The court below, considering the entire opening statement including its own pre-trial instructions said: "I do not think any untoward impression was left with the jury and if it could be said that such impression was created, it can be corrected by counsel limiting their arguments to the appropriate issues in the case and by adequate instructions of the court." As another reason for rejecting the offer of expert testimony the court said: "It is our view that no reliable expert technique has yet been developed or perhaps can ever be developed to ascertain with any degree of accuracy the future market price of securities or the effect of events upon it." These reasons are fully adequate to support the court's ruling excluding the proffered expert testimony.

The appellants submitted several witnesses to testify to the appellants' good reputation. They object to questions asked these witnesses on cross-examination. One of these questions was whether the witness had ever heard that Merritt-Chapman and Scott Corporation, of which appellant Wolfson was chairman of the board, had been con-

victed for bribing a state official. The appellants complain of lack of proof that Wolfson had anything to do with the event. Another question concerned the witness' knowledge of a consent decree entered against Wolfson in another action years before permanently enjoining him from further violations of the anti-fraud and anti-manipulative provisions of the Securities Exchange Act of 1934 with respect to purchases of stock of American Motors Corporation. The third question concerned the witness' knowledge of pending indictments against both appellants for filing false statements, perjury and conspiracy to commit fraud in connection with the purchase and sale of Merritt-Chapman and Scott stock. The last two questions were not objected to at the trial and none of the questions are objectionable anyway.

"The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue." *Michelson* v. *United States,* 335 U. S. 469, 479 (1948). The question asked the appellants' character witnesses on cross-examination fall well within the limits fixed by the *Michelson* case and the court afforded the appellants full protection on this matter in its charge. Moreover, courts of appeals rarely and only on clear showing of prejudice will disturb the ruling of the trial courts on this subject. *Michelson* v. *United States, supra* 480.

The appellants' contention of error in the charge on the issue of wilfulness is not well founded. They contend that their "plain" defense was that they believed registration was not required when a controlling individual desired to sell his stock in an unlisted corporation such as Continental

Enterprises, and assert that the court's charge deprived them of this defense. In the first place it is not clear that this was the appellants' defense. They point to some testimony from Wolfson that he thought there was a difference between listed and unlisted stock, but they completely overlook testimony of Wolfson on the next day explaining that he was confused the day before and was referring to insider reports on stock ownership, where there is a difference, not to registration. The appellants' real defense was that they had never heard of registration requirements applicable to either listed or unlisted stock, and on this issue the instruction was if anything more favorable to them than they were entitled to. Even if properly objected to we see no error in the charge on wilfulness as given.

The appellants contend that they were never apprised of the "gist" of the accusation against them until the close of the case. They argue that because they did not know how they were said to have violated § 5 they were not able to make proper defense. Even if they were prejudiced when their defense was ignorance of the law the contention has no basis in the record. It is clear that the appellants were fully apprised of the charges against them at the hearing on their pre-trial motion to dismiss. See *United States* v. *Wolfson,* 269 F. Supp. 621 (S. D. N. Y. 1967).

Their further assertion that the court below prejudicially interrogated their witnesses, particularly themselves when on the stand in their own defense, is equally without foundation in the record. The court's questions show no prejudice. They were designed only to clarify not to embarrass. The court did not by any means take over the prosecution for the Government.

In conclusion it will suffice to say that full consideration of the voluminous record in this rather technical case discloses no reversible error.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS E. WOLFSON AND ELKIN B. GERBERT,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is *DENIED.*

LEONARD P. MOORE
PETER WOODBURY by LPM
J. JOSEPH SMITH Circuit Judges

January 23, 1969

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. New York.
May 18, 1967.

No. 66 Cr. 720.

UNITED STATES OF AMERICA

v.

LOUIS WOLFSON and ELKIN GERBERT,
Defendants.

Robert M. Morgenthau, U. S. Atty., Southern Dist. of New York, New York City, for United States; Michael F. Armstrong and Paul B. Galvani, Asst. U. S. Attys., of counsel.

Shea, Gallop, Climenko & Gould, New York City, for defendant Wolfson and co-counsel for defendant Gerbert.

Arnold & Porter, Washington, D. C., co-counsel for defendant Gerbert.

PALMIERI, District Judge.

The defendants are charged in nineteen counts with violating and conspiring to violate the registration provisions of the Securities Act of 1933 (15 U.S.C. § 77e(a)) with respect to the allegedly illegal distribution to the public of common stock in the Continental Enterprises, Inc. (Continental).

They move for various forms of relief, several of which are dealt with here at the outset inasmuch as they are, in effect, repetitive of motions made with respect to another indictment—66 Cr. 832. This indictment was filed by the same Grand Jury against these defendants, as well as others, and will be referred to for convenience as the Merritt-Chapman case.

These repetitive motions seek to dismiss the indictment on two separate grounds: first, that the Grand Jury which handed down the indictment was selected in violation of the Fifth Amendment and 28 U.S.C. §§ 1861, 1862, 1863, 1864 and 1865;[1] and second, that the defendants' Constitutional rights were violated by allegedly improper conduct of the United States Attorney before the Grand Jury. The allegedly improper conduct relates to the calling of a possible defendant to testify before a Grand Jury investigating his activities, after being advised that the prospective witness would assert his Fifth Amendment privileges; and the management of such a witness' questioning before the Grand Jury as well as the availability of his legal counsel during such questioning. The basic facts relating to the motions in both cases are the same. The Grand Jury, the Grand Jury minutes, and the defendants[2] are identical with respect to the motions in both the Continental and the Merritt-Chapman cases. Under date of April 4, 1967, Judge Cooper of this Court filed an extensive opinion denying the relief requested on both grounds. Similar contentions have been made by other defendants in two recent cases with respect to similar alleged improper conduct of the United States Attorney and have been ruled on adversely to the defendants by Judge Tenney of this Court (United States v. Leighton, et ano., 265 F.Supp. 27, Jan. 23, 1967) and by Judge Weinfeld of this Court (United States v. Pilnick, et al., 267 F.Supp. 791, April 25, 1967). There is no valid reason for any departure by this Court from the views expressed by the three Judges approving the conduct of the United States Attorney in each instance. Accordingly, the

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[1] These sections concern the qualifications of Federal jurors; exemptions, exclusions, and excuses from jury service; manner of drawing names of jurors; jury commissioners and their compensation; apportionment within districts; and additional jury commissioners.

[2] Two additional defendants also moved in the Merritt-Chapman case.

motions are denied for the reasons set forth in their respective opinions.

The defendants additionally have moved, concededly *pro forma,* for a list of the witnesses expected to be called by the Government at the trial. This relief has been previously denied by this Court in a non-capital case and is denied here for the reasons set forth in United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965).

The remaining motions seek (1) transfer of the trial to the Middle District of Florida, (2) dismissal of the substantive counts, and (3) dismissal of the indictment. These will be discussed seriatim.

The Motion to Transfer

This motion is made pursuant to the provisions of Rule 21(b), Fed.R.Crim.P.[3] A previous motion to transfer based upon Rule 21(a), Fed.R.Crim.P.,[4] was denied by Judge Tyler of this Court on December 13, 1966. In essence, the defendants claim that since the defendants live in Jacksonville, Florida, and since the corporate records of Continental are in Jacksonville, the trial should be transferred to Florida. Additionally, personal reasons of health and convenience are advanced. It is also contended that prospective defense witnesses will come from Florida and can appear more readily and testify more effectively if the transfer

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[3] "Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

[4] "For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

were allowed. The defendants also urge that a review of their motion previously denied by Judge Tyler may impel a different result when considered along with the factors asserted in support of the motion now made pursuant to Rule 21(b), Fed.R.Crim.P. The relief requested must be denied because none of the factors, whether considered singly or collectively, would justify transfer of the trial. This motion is concededly addressed to the Court's discretion. Platt v. Minnesota Mining Co., 376 U.S. 240, 245, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964), and must be sufficiently persuasive to override the general rule that a criminal prosecution should be retained in the original district. United States v. United States Steel Corp., 233 F.Supp. 154 (S.D.N.Y. 1964). The venue here is correct and is based upon substantial financial transactions which took place in this district. The defendants are persons of substantial means to whom questions of travel and transportation should not present serious difficulties. Moreover, the trial court has sufficient power and latitude in the management of the trial to take account of matters which seriously affect the convenience of parties or witnesses. Additionally, extensive and rapid facilities for travel between New York and Florida are available. Indeed, the defendants are directors of the Merritt-Chapman & Scott Corporation which has its main offices in New York.

Finally, the matter of timeliness deserves mention. Rule 22, Fed.R.Crim.P., provides:

> A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

Substantially all of the grounds asserted as the basis for this motion could have been put forward when the prior motion before Judge Tyler was argued in November, 1966. This indictment was filed on September 19, 1966, and the related Grand Jury proceedings to which defendants were subpoenaed took place in August and September, 1966.

While the motion is denied on the merits and not for lack of timeliness, this Court feels constrained to point out that the renewed and revamped motion for transfer is made about seven months after the indictment, and on the eve of trial.

The Motion to Dismiss the Substantive Counts

The substantive counts of the indictment, Counts 2 through 19, allege mailings of confirmations of sales of securities to the defendant or his agent. Counts 2 through 11 and 17 through 19 each alleges the mailing of a confirmation of sale from the New York broker who executed the sale to the defendant Wolfson. Counts 12 through 16 allege the mailings of similar confirmations to James Mullaney of Jacksonville, Florida, presumably a person whose agency relationship will be established at trial. These allegations have been amplified by a bill of particulars.

The "use * * * of the mails to sell [unregistered stock] through the use or medium of any prospectus *or otherwise*," (emphasis supplied) is forbidden by 15 U.S.C. § 77e(a) (1). Anyone who causes such a "use" is responsible for it under 18 U.S.C. § 2.

The defendants suggest that the confirmations alleged are not within the purview of the statutory prohibition because they constituted mailings to a seller allegedly after consummation of the sale. Mailings of confirmations to purchasers are within the purview of the statute. United States v. Greenberg, 30 F.R.D. 164 (S.D.N.Y. 1962). The defendants, while conceding that a confirmation sent to a purchaser "might be a mailing offensive to the policy of the Securities Act of 1933", argue that "a confirmation sent to the seller by his own broker does not conflict with the thrust of the Act in the slightest.

The distinction is not validly drawn. There is nothing in the Act to suggest that its thrust is confined to elements of

disclosure by a seller to a purchaser; and the defendants have cited no case to support their position. In United States v. Hughes, 195 F.Supp. 795 (S.D.N.Y. 1961), it was expressly held that the statutory language above quoted was by its terms —"prospectus or otherwise"—sufficiently broad to include confirmations of purchases as appropriate allegations for substantive counts under 15 U.S.C. § 77e(a)-(1). Rules 15(c) ((1) through (4) under the Securities Exchange Act of 1934, requiring a broker to send a confirmation to the seller at the time of the sale, make the sending of such a confirmation an essential step in the process of sale. The confirmation to the purchaser and the confirmation to the seller are opposite sides of the same coin, each brought about by the seller's order with the broker; one advising the buyer of the requirement for payment, the other advising the seller of the correlative requirement for surrender of the stock.

If general guidance in this area were needed it can be found in the language of the opinion in Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875, 878 (2d Cir. 1943): "In declaring unlawful the transactions described in Section 5 Congress meant to exert its power to the full constitutional extent permitted by the commerce clause and the postal clause." (footnote omitted).

The conclusion is inescapable that the statute prescribes any mailing or use of interstate commerce made for the purpose of effecting the sale, transfer or delivery of unregistered stock.

The Motion to Dismiss the Indictment on the Grounds of (a) Alleged Unconstitutional Vagueness in the Concept of Control in the Securities Act and (b) Alleged Exemptions under the Securities Act of 1933

These are elaborate motions in which the defendants seek to demonstrate that the concept of "control" under the Securities Act of 1933 is vague and indefinite in violation of

the Fifth Amendment to the United States Constitution; and, further, that they are exempt from the registration provisions of the Securities Act.

Both branches of this motion are made in some measure upon assumptions of what the Government's proof will be at trial. They are to that extent premature and present questions that can appropriately be decided only by the trial court.

The "control" concept under the Securities Act of 1933 is not defined by the statute. But it was expressly passed upon in United States v. Re, 336 F.2d 306, 316 (2d Cir.), cert. denied, 379 U.S. 904, 85 S.Ct. 188, 13 L.Ed.2d 177 (1964), where the Court stated that the meaning of "control" is no different under the Act from what it is in normal everyday usage and that the "requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding" citing Sproles v. Binford, 286 U.S. 374, 393, 52 S.Ct. 581, 583, 76 L.Ed. 1167 (1932); cf. United States v. Guterma, 281 F.2d 742, 746-747 (2d Cir.), cert. denied, 364 U.S. 871, 81 S.Ct. 114, 5 L.Ed.2d 93 (1960); United States v. Minuse, 142 F.2d 388 (2d Cir.), cert. denied, 323 U.S. 716, 65 S.Ct. 43, 89 L.Ed. 576 (1944).

The legitimate interests of the defendants with respect to whether or not they were persons in control can be properly served by a fair submission of the issues to the jury. The possible problems raised by the concept of control can neither be anticipated nor ruled upon in the present posture of the case.

The second branch of this motion rests on the defendants' contention that the transactions charged as violative of the 1933 Act cannot be so classified because the securities involved did not require registration and are expressly exempt from registration. The requirement for registration is provided for in Section 5(a) of the 1933 Act, 15

U.S.C. § 77e(a).[5] The express exemptions relied upon are set forth in Section 4 of the 1933 Act, 15 U.S.C. § 77d.[6] In essence, the defendants urge that these statutory provisions by their meaning and in accordance with administrative rulings adopted by the Securities and Exchange Commission as late as May 1946, allowed a controlling stockholder to sell his securities through a broker without registration.

No relevant legal authority has been cited by defendants in support of this argument nor has any been found.

Any extended discussion of defendants' argument is hardly justified since it leads to the curious and anomolous result that a massive distribution of unregistered control stock as here alleged [7] can be effected through a broker without the risk of statutory sanctions. Such a result is not

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[5] This section provides that:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium or any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means of instruments of transportation, any such security for the purpose of sale or for delivery after sale.

[6] They provide as follows:

> (1) transactions by any person other than an issuer, underwriter, or dealer.
>
> * * * * * * * * *
>
> (4) brokers' transactions, executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

[7] The indictment charges that the defendants would sell approximately 460,000 shares and their co-conspirators 230,000 shares of the Continental common stock. The Government asserts that there were 2,510,000 shares of Continental issued and outstanding.

consonant with the meaning or purposes of the Act. See 1, Loss, Securities Regulations (2d ed. 1961) pp. 700-706.

The Securities Act of 1933 sets forth a comprehensive plan to achieve its objective of protecting the investing public. One of the essential steps adopted in furtherance of this objective was the requirement for the filing of registration statements making a full and accurate disclosure of all material facts. Thus, the investing public was intended to have available to it reliable information upon which an appropriate judgment could be made with respect to any investments in the registered security. The broad and all-encompassing prohibition against the use of the mails or means of interstate commerce to sell unregistered securities must be read in conjunction with the claimed exemptions which are in the nature of exceptions to the overriding purposes of the Act. Securities and Exchange Com'n v. Guild Films Co., 279 F.2d 485, 489-490 (2d Cir. 1960). The statute

> "does not affect the ordinary redistribution of securities unless such redistribution takes on the characteristics of a new offering by reason of the control of the issuer possessed by those responsible for the offering. It carefully exempts from its application certain types of securities and securities transactions where there is no practical need for its application or where the public benefits are too remote." H.R.Rep. No. 85, 73rd Cong., 2d Sess. 5 (1934).

Here where sales of large quantities of securities were allegedly made generally to the public, the benefits of this remedial statute should not be thrust aside. The "terms of * * * an exception * * * must be 'strictly construed' against the claimant of its benefit". Securities and Exchange Com'n v. Sunbeam Gold M. Co., 95 F.2d 699, 701 (9th Cir. 1938); cf. Securities and Exchange Com'n v. Ralston Purina Co., 346 U.S. 119, 126, 73 S.Ct. 981, 97 L.Ed. 1494 (1953); Edwards v. United States, 312 U.S. 473, 61 S.Ct. 669, 85 L.Ed., 957 (1941); Securities and Exchange Com'n v. Culpepper, 270 F.2d 241, 246 (2d Cir. 1959).

Moreover, these exemptions cannot be understood with reference to any particular person's general business but on the basis of his relationship to a particular transaction. The individuals who take part in the transaction are exempt only insofar as the transaction is exempt.

Depending upon the evidence adduced at the trial the defendants may be found to be controlling persons who used underwriters to distribute stock to the public, or to be themselves underwriters. See United States v. Crosby, 294 F.2d 928, 939-940 (2d Cir. 1961), cert. denied, 368 U.S. 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962). Whether this can be established is not now predictable and depends, of course, upon the outcome of the trial. The jury will be obliged to consider the evidence under appropriate instructions. It will be their ultimate responsibility to determine whether the shares in question were required to be registered and whether the transactions were exempt. The Court cannot now make a ruling eliminating these crucial questions from jury consideration.

Motions denied. It is so ordered.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,919A

HATTIE MAE RICKS and JOSEPH N. WILLIAMS,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the District of Columbia
Court of Appeals

Decided December 23, 1968

Messrs. Monroe H. Freedman and *Sol Rosen,* with whom *Mr. Ralph J. Temple* was on the brief, for appellants.

Mr. Theodore Wieseman, Assistant United States Attorney, with whom *Messrs. David G. Bress,* United States Attorney, and *Frank Q. Nebeker* and *Earl J. Silbert,* Assistant United States Attorneys, were on the brief, for appellee.

Before TAMM, LEVENTHAL and ROBINSON, *Circuit Judges.*

ROBINSON, *Circuit Judge:* In *Ricks* v. *District of Columbia* (*Ricks I*),[1] decided today, we hold that three subsections of the District of Columbia's "general vagrancy" law[2] are unconsitutionally vague. Before us now is a similar challenge[3] to the "narcotic vagrancy" act[4] in operation in the

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[1] No. 20,919, *Ricks* v. *District of Columbia,* hereinafter cited "*Ricks I.*"

[2] D.C. Code §§ 22-3302 to 22-3306 (1967 ed.)

[3] D.C. Code § 33-416a (1967 ed.)

[4] Appellants also urge other grounds of unconstitutionality but, in our view of the case, it is unnecessary to consider them.

District. Like its *Ricks I* prototype, this statute sets forth alternative definitions of a "vagrant" [5]—a term here involving indispensably narcotic drug usage or past conviction of a narcotic offense [6]—and makes vagrancy under its provisions a misdemeanor.[7] And like the general vagrancy enactment,[8] the narcotic vagrancy law has been implemented administratively with police observation procedures which are pursued before vagrancy arrests are made.[9]

Both appellants were subjected to a series of pre-arrest observations, all in the 1200 block of Seventh Street, Northwest, and the testimony at trial described what was seen on each occasion. On January 6, 1966, at 11:00 p.m., appellant Williams was on the street with two women said to be convicted narcotic offenders. On January 13, at 11:30 p.m., he conversed with another female narcotic user in front of

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[5] D.C. Code § 33-416a(b)(1) (1967 ed.). And see text *infra* at notes 14 and 15.

[6] D.C. Code § 33-416a(b)(1) (1967 ed.). And see text *infra* at notes 14 and 15, and note 14, *infra*.

[7] D.C. Code § 33-416a(g) (1967 ed.). It is further provided that "[t]he court, in sentencing any person found guilty under the provision of this section, may in its own discretion or upon the recommendation of the probation officer, impose conditions upon the service of any such sentence. Conditions thus imposed by the court may include submission to medical and mental examination, and treatment by proper public health and welfare authorities; confinement at such place as may be designated by the Commissioners of the District of Columbia, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant." D.C. Code § 33-416a(h) (1967 ed.).

[8] *Ricks I, supra* note 1, at 2.

[9] Narcotic vagrancy observations involve periodic police surveillance and questioning of a suspected narcotic vagrant, and are mechanically similar to the general vagrancy observations described in *Ricks I, supra,* note 1, at note 10. Two observations normally precede a narcotic vagrancy arrest, the suspect becoming subject to arrest upon the third observation.

a building. Both appellants, on January 22 at 3:20 a.m., crossed Seventh Street, entered a building and remained in the hallway for 15 minutes. Needle marks were discerned on appellant Williams' arm each time, and one of these marks was said to be fresh. Each time, however, questioning by the observing officers produced an explanation for his presence in the neighborhood and a denial that he was using narcotics.

Observations on appellant Ricks [10] began on February 21, 1966, when she sat, for short periods after midnight, in a carry-out shop before twice leaving with different men and later returning alone. Two days later, at 9:30 and 9:45 p.m., she stood on the street with two women reputed to be narcotic law violators and prostitutes; within the hour, she was on the street alone, and at 11:00 p.m. she entered a bar. On February 24, between 4:00 and 4:45 a.m., she got into and out of parked cars with men behind the wheels. On March 1, at 10:50 p.m., she was on the street for ten minutes. She had old and new needle marks on her arm, so the testimony ran, but on all but one occasion she denied the use of narcotics. And each time she gave explanations for her presence on Seventh Street, but once admitted to two acts of prostitution.

The arrests occurred on March 8, 1966, about 10:15 p.m. As officers watched from across the street, appellants stood in the 1200 block of Seventh Street, Northwest, in the company of "a known and admitted" gambler and two "known and convicted" narcotic violators and prostitutes. Appellant Williams was then engaged in an argument with one of the women who claimed that he had "sold me some bad stuff." [11] The accuser called the officers over and repeated the accusation, which was promptly denied.[12]

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[10] Also the appellant in *Ricks I, supra* note 1.

[11] In the context of the record, the reference was to an alleged sale of narcotic drugs.

[12] Appellant Williams repeated this denial at trial.

Examination revealed "fresh marks" on both appellants' arms and, after questioning,[13] each was placed under arrest.

Appellants were prosecuted on separate informations charging vagrancy within two of the statute's specifications:

> "(b) For the purpose of this section—
>
> "(1) The term 'vagrant' shall mean any person who is a narcotic drug user [14] or who has been convicted of a narcotic offense in the District of Columbia or elsewhere and who—
>
> "(A) having no lawful employment or visible means of support realized from a lawful occupation or source, is found mingling with others in public or loitering in any park or other public place and fails to give a good account of himself; or . . .
>
> "(C) wanders about in public places at late or unusual hours of the night, either alone or in the company of or association with a narcotic drug user or convicted narcotic law violator, and fails to give a good account of himself;" [15]

At a joint trial in the Court of General Sessions, appellants moved to dismiss the informations for alleged unconstitutional vagueness in the statutory proscriptions. Chief Judge Greene, noting the similarity of the general and the narcotic vagrancy statutes, and relying upon his opinion in *Ricks I*,[16]

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[13] Appellant Williams responded to many of the questions. Appellant Ricks refused to answer any at all.

[14] "[T]he term 'narcotic drug user' shall mean any person who takes or otherwise uses narcotic drugs, except a person using such narcotic drug as a result of sickness or accident or injury, and to whom such narcotic drugs are being furnished, prescribed, or administered in good faith by a duly licensed physician in the course of his professional practice." D.C. Code § 33-416a(b)(2) (1967 ed.).

[15] D.C. Code § 33-416a(b)(1)(A), (C) (1967 ed.).

[16] *District of Columbia* v. *Ricks*, 94 Wash. L. Rptr. 1269 (1966).

was of the opinion that the latter was unconstitutional. Considering, very properly, that he was bound by decisions of the District of Columbia Court of Appeals to the contrary,[17] he denied the motions, found each appellant guilty, and sentenced each to a term in jail. The Court of Appeals affirmed,[18] and the importance of the constitutional issues raised led to allowance of this further appeal. Without reaching other contentions advanced by appellants, we hold that the statutory provisions upon which they were convicted in this case are vague to the point that they contravene the Fifth Amendment, and accordingly reverse.

I

We are greeted at the outset with the Government's protest that appellants lack standing to urge the unconstitutionality of the narcotic vagrancy statute on its face. The Government expresses concern that appellants will be permitted to "attack the statute on the ground that its language might permit it to be applied in an unconstituional manner to other people in hypothetical situations not involved in the instant case." We think it clear, however, that the Government has misconceived appellants' point of view. For this reason, we deem it helpful to mark out the contours of this litigation, to identify what is involved, and to shape the issue we are summoned to decide.

Appellants contend that they have been arrested and convicted for violation of two statutory subsections framed in language too imprecise to fairly warn them of the conduct sought to be prohibited.[19] Appellants also say that the

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[17] See *Wilson* v. *United States*, 212 A.2d 805 (D.C.App. 1965), *rev'd on other grounds* 125 U.S.App.D.C. 87, 366 F.2d 666 (1966); *Rucker* v. *United States*, 212 A.2d 766 (D.C.App. 1965); *Brooks* v. *United States*, 208 A.2d 726, 728 (D.C.App. 1965); *Harris v. United States*, 162 A.2d 503, 505 (D.C.Mun.App. 1960); *Jenkins* v. *United States*, 146 A.2d 444, 447 (D.C.Mun.App. 1958).

[18] *Ricks* v. *United States*, 228 A.2d 316 (D.C.App. 1967).

[19] See discussion in text *infra* pt. II.

ambiguities in these two subsections left police officers free to charge, and judicial officers free to assess, their guilt solely on the basis of conjecture.[20] Appellants' complaint is addressed to the two subsections upon which their convictions were rested,[21] and to the impact of those subsections upon them alone.[22] Their position is not camouflaged by makeweight hypotheticals in an effort to induce us to "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," [23] nor do they call upon us "to anticipate a question of constitutional law in advance of the necessity of deciding it."[24] Appellants, in endeavoring to demonstrate their thesis, of unconstitutional personal harm, are at liberty to resort to the linguistic sources of their present legal difficulties.[25]

II

Proceeding now to the merits, and examining the two subsections of the narcotic vagrancy law under which appellants were convicted, we see the substantial similarity of the statutory proscriptions which were applied against appellants in this case and those which in *Ricks I* we held to be constitutionally insufficient.

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[20] See discussion in text *infra* pt. II.

[21] And we, of course, do not consider the validity of any other parts of the statute.

[22] Thus we deem inapposite the proposition, relied on by the Government, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

[23] *Barrows* v. *Jackson*, 346 U.S. 249, 256 (1953). See also *United States* v. *Raines*, *supra* note 22, 362 U.S. at 21.

[24] *United States* v. *Raines*, *supra* note 22, 362 U.S. at 21.

[25] We distinguish this point from the facet of the Government's argument discussed in the text *infra* at notes 10-15.

Subsection (A), upon which the first charge against appellants was laid, defines as a vagrant any unemployed narcotic user or convicted narcotic offender [26] without lawful and "visible means of support" who "is found mingling with others in public or loitering in any . . . public place and fails to give a good account of himself." [27] The striking resemblance of this subsection to the invalid *Ricks I* subsection (1) [28] is apparent.

Subsection (C), the statutory predicate for the second accusation against appellants, extends the vagrant definition to any narcotic user or convicted narcotic offender [29] who "wanders about in public places at late or unusual hours of the night . . . and fails to give a good account of himself." [30] The close likeness this subsection bears to the infirm *Ricks I* subsections (S) [31] is manifest.

The same fatal statutory generalities discussed in *Ricks I*—"loitering," [32] failure to give "a good account," [33] "wanders," [34] and without "visible means of support" [35]—pervade the enactment under scrutiny,[36] without any legislative def-

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[26] See note 14, *supra*. Both appellants had previously been convicted of offenses against the narcotic laws.

[27] D.C. Code § 33-416a(b)(A) (1967 ed.).

[28] *Ricks I, supra* note 1, at 9-10.

[29] See note 14, *supra*.

[30] D.C. Code § 33-416a(b)(C) (1967 ed.).

[31] *Ricks I, supra* note 1, at 17-18.

[32] *Ricks I, supra* note 1, at 9-12.

[33] *Ricks I, supra* note 1, at 12-15.

[34] *Ricks I, supra* note 1, at 17-18.

[35] *Ricks I, supra* note 1, at 17-18.

[36] Similarly "mingling with others," even as applied to convicted offenders, is an expression imprecise in content. Compare *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456-58 (1939). See also *Baker* v. *United States*, 228 A.2d 323 (D.C.App. 1967).

initiation whatever. Both of the subsections involved in this appeal incorporate at least two of them as essential elements of the crimes of which appellants were found guilty. As was the situation in *Ricks I*, there is no body of limiting judicial construction helpful to the problems presented here.[37]

Thus we cannot find in the statutory language a degree of specificity that would enable citizens of ordinary intellect to distinguish wrong from right, or administrators or jurists to confidently make applications. And like the provisions involved in *Ricks I*, those here in issue open the door wide to convictions on suspicion in lieu of proof of criminality. A vagrancy conviction is precipitated by the police record accumulated from vagrancy observations, and the observations enable the building of that record on suspicion alone. The process is well illustrated by the testimony of the officer who made the first observation of appellant Ricks. She was selected for a vagrancy observation "[b]ecause in my opinion she was involved in some sort of an illegal activity" which the witness suspected was prostitution. "[T]he basis for that suspicion" was that "she's a known prostitute" and because the officer twice saw her leave the carry-out with different men and return shortly thereafter. Admittedly these circumstances created no ground for a prostitution arrest, but they "did justify . . . making an observation on her as a vagrant." So, as the officer further admitted, "the reason that she was singled out from among the other people on the street derives from the fact that [the officer] had suspicions of her regarding illegal conduct that [he] did not have regarding other people on the street."

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[37] See *Hymes* v. *United States*, 221 A.2d 711, 712 (D.C.App. 1966) (prior knowledge that accused is narcotic user or convicted narcotic offender is prerequisite to narcotic vagrancy arrest); *Jenkins* v. *United States*, *supra* note 17, 146 A.2d at 446 (statute applies even though defendant did not know his associates were drug users and convicted narcotic offenders).

Although appellants were arrested for and convicted of narcotic vagrancy, the Government conceded at trial that at no time were they found in the possession of narcotic drugs. While needle marks were seen on their arms when inspected at the observations, the evidence would not sustain the conclusion that they connoted present, as distinguished from possibly recent, narcotic use. The testimony discloses, too, that if the observing officers had had reasonable cause to believe that appellants were then in violation of the narcotic laws, they would have been arrested for such violations rather than made the subjects of vagrancy observations. More broadly, if there had been grounds for arrest for any kind of criminal conduct, the arrest would have superceded the observation. Thus, as one officer put it, when you "suspect" a person "of some form of crime," a narcotic vagrancy observation is "sort of something you do instead of making an arrest."

A basic suspicion underlying narcotic vagrancy enforcement, the testimony further disclosed, is that "sometimes" when addicts are on the streets they "may" be plotting crime. This was vividly confirmed by the prosecutor in colloquy with the judge at trial:

> "THE COURT: . . . What are these people doing in your view when they are loitering or mingling and failing to give a good account of themselves? . . . What are they doing that is harmful to the public? What is the statute addressed to?
>
> "[THE PROSECUTOR]: They are . . . in a position where from their way of life there is a real danger that they will commit some other crime, not this particular crime [narcotics vagrancy], but some other crime.
>
> "THE COURT: So, we suspect that because of what they are doing here, they might well engage in criminal conduct? Is that what it comes down to?
>
> "[THE PROSECUTOR]: That is correct.
>
> "THE COURT: And you think that under our system you can have a statute which essentially proceeds on

> the principle that because the police officer or prosecutor or a court suspects that because of presence or activity or whatever, a person may commit an offense, that that in itself may be made a crime?
>
> "[THE PROSECUTOR]: Absolutely."

As *Ricks I* forecasts, we do not agree with the prosecutor.[38] And it is evident from our exposition in *Ricks I* that, unless somehow otherwise saved, we must hold that both of the subsections underpinning appellants' convictions fall short of the constitutional dictate that criminal conduct be defined with reasonable certainty.[39]

III

The Government would find the antidote for the ills plaguing the narcotic vagrancy statute in the mode of its accustomed administration. Bypassing the statutory language in favor of its particular application to appellants, the Government endeavors to construct a more palatable decisional context for the vagueness problem. Appellants were narcotic users, it points out, who loitered nightly with other narcotic users in a block where narcotic traffic was dense. It is only in a "pocket of narcotic activity," it asserts, that police officers invoke the statute. These pockets are said to be the points at which addicts congregate while awaiting a "connection"—a contact with a peddler of narcotic drugs; these circumstances of "sinister significance," it is claimed, warrant vagrancy observations and justify a "good account" on pain of ultimate arrest. An enforcement policy so limited as to area, subjects and purposes, the Government urges, brings the statute in line with the Constitution.

We cannot accept this argument. To begin with, the record does not adequately sustain the Government's factual premises. Narcotic vagrancy enforcement, the record shows,

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[38] *Ricks I, supra* note 1, at 10-12.

[39] *Ricks I, supra* note 1, at 6-9.

is stepped up in four precincts in the District of Columbia where the police consider the incidence of vice to be particularly high.[40] Officers specializing in the suppression of drug traffic bear down in these sections of the city.[41] The testimony describing the 1200 block of Seventh Street, Northwest, made out plainly enough its unwholesome characteristics,[42] but hardly the "pocket of narcotic activity" the Government tries to picture.

While suspected narcotic users frequented the block, the record is bare of evidence that sales of narcotic drugs occurred there. While reputed narcotic users and prostitutes were familiar characters in the testimony recounting the observations in this case, the dealer in narcotics was totally absent. The observations themselves—particularly those on appellant Ricks, which smack of surveillance for prostitution—are devoid of the "sinister significance" of trafficking in drugs. While the 1200 block may have been one of the police department's favorite targets, there is nothing to sug-

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[40] This is based on a belief that these precincts embrace areas prone to illegality, but yet a belief not based on facts rising to the dignity of probable cause. Suspect establishments thus continue to operate, but residents of these neighborhoods who are thought to be frequenting them are observed, arrested and convicted for vagrancy.

[41] We have frequently noted that the police constantly receive complaints of narcotic activity in certain areas of the city. See *Dorsey* v. *United States,* 125 U.S.App.D.C. 355, 356, 372 F.2d 928, 929 (1967), *Hutcherson* v. *United States,* 120 U.S.App.D.C. 274, 281, 345 F.2d 964, 971, *cert. denied* 382 U.S. 894 (1965); *Freeman* v. *United States,* 116 U.S.App.D.C. 213, 214, 215, 322 F.2d 426, 427, 428 (1963).

[42] At the time of appellants' arrests, the 1200 block of Seventh Street, Northwest, was lined by two-story buildings with stores on the street floors and rooming houses on the upper floors. In the testimony, the block was described as "an area frequented by known and convicted con artists, [and] known and convicted narcotic violators," and the rooms as "dens of vice" for "the prostitutes and the junkies and the con artists, to perform their trades."

gest that it was driven home to the citizenry that conduct unmolested in the city generally [43] would become criminal in that block by reason of concentrated narcotic vagrancy enforcement there.

Moreover, error in the Government's legal thesis mounts with the Government's increase in overstatement of pertinent doctrine. We are not at liberty to ignore the shortcomings of the statutory language, or rationalize its validity, simply on the basis of the methods associated with its administration. "[A] statute attacked as vague must initially be examined 'on its face,' " [44] and many times the inquiry need extend but little further.[45] The *sine qua non* of constitutional certainty in the definition of crime is fair warning of the statutory prohibitions to those of ordinary intelligence—notice of the proscribed activities which is reasonable when gauged by common understanding and experience.[46] But "it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of 'valid' or 'invalid' solely on the basis of such an examination," [47] so that "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which the defendant is charged." [48]

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[43] By reason of general non-enforcement of the narcotic vagrancy statute.

[44] *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32 (1963).

[45] See, *e.g.*, *Giacco* v. *Pennsylvania*, 382 U.S. 399, 403 (1966); *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963); *Lanzetta* v. *New Jersey*, *supra* note 36, 306 U.S. at 453-58; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 453-57 (1927); *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393-95 (1926); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

[46] *Ricks I*, *supra* note 1, at 6-8.

[47] *United States* v. *National Dairy Corp.*, *supra* note 44, 372 U.S. at 32.

[48] *Id.* at 33.

Thus a statute making unlawful sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" may adequately admonish that sales made below cost with that intent fall under the ban.[49] Similarly, a statutory prohibition on demonstrations "near" a courthouse, despite its ambiguity in other contexts, may convey an exhortation against "a demonstration within the sight and hearing of those in the courthouse." [50] In these illustrative situations, criminal statutes that might have been plainer were applied to the infringing conduct of those who should have known better, and were left none the worse off by the lack of further elucidation. But "[t]his is not to say that a bead-sight indictment can correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage." [51]

We have before us a blunderbuss statute without a bead-sight enforcement policy. Since nothing in the police department's administrative practices gave the advance warnings which the statute omitted, those practices could not in any event supply the constitutional deficiencies. Moreover, the statute before us does not afford reasonable warning as to the activities it undertakes to make criminal. In *Lanzetta* v. *New Jersey*,[52] the Supreme Court held that an unconstitutionally vague statute could not be saved by definition in the indictment "[i]f on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it," [53] for "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." [54] For similar reasons, the

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[49] *Id.* at 34.

[50] *Cox* v. *Louisiana*, 379 U.S. 559, 568-69 (1965).

[51] *United States* v. *National Dairy Corp.*, *supra note* DD, CGB *U.S.* at 33.

[52] *Supra* note 36.

[53] *Id.* at 453.

[54] *Id.*

narcotic vagrancy statute, so indistinct from overbreadth, cannot be cut down to constitutional size by the unpublicized scope limitations which its enforcement plan espouses.[55] at 33.

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[55] Compare *United States* v. *Five Gambling Devices*, 346 U.S. 441 (1953), involving a statute prohibiting transportation of "any gambling device" in interstate commerce, and requiring "every . . . dealer" in such devices to register with the Attorney General "the addresses of his places of business in such district" and to report to the Attorney General all sales and deliveries of gambling devices "for the place or places of business in the district." Indictments against two dealers, and a libel to forfeit five gambling machines, for violation of the registration and reporting requirements failed to allege that any gambling devices had moved in interstate commerce. Judgments dismissing the indictments and libel were affirmed. Three justices joined in an opinion expressing the view that the statute, as a matter of construction, did not sustain the indictments and libel. *Id.* at 442-52. Justices Black and Douglas, in a concurring opinion, delineated the position that the registration and reporting requirements were unconstitutionally vague. "[T]he use of the phrase 'such district' is bound to leave a dealer bewildered. Does the phrase refer to the place where a dealer is compelled to file his papers? Or does it simply force him to tell in what 'district' he maintains 'places'? If a dealer is able to solve this puzzle, how is he to find 'such district'? The Act gives no hint as to where the 'district' is or how a person can locate it. It never describes any 'district.' " *Id.* at 453.

We focus on the concurring opinion primarily for what it says with respect to an administrative effort to rectify the statutory ambiguities. The Attorney General promulgated a regulation which clarified the matter, but the two concurring justices deemed it inefficacious for that purpose. "Nor can a criminal statute too vague to be constitutionally valid be saved by additions made to it by the Attorney General. Of course, Congress could have prescribed that reports should be made at reasonably acessible places designated by the Attorney General. . . . But the Act under consideration did not do this." *Id.* at 453. Moreover, the statute upon which the Attorney General drew for authority to issue the clarifying regulation did not "support the Attorney General's attempt to infuse life into an Act of Congress unenforceable for vagueness. The vital omission in this criminal statute can be supplied by the legislative branch of government, not by the Attorney General." *Id.* at 453-54.

The flow and use of narcotic drugs in the Nation's Capital presents a critical social problem of monumental dimensions, and the need for effective legislative curbs is great. But as we pointed out in *Ricks I*, even desirable goals "cannot be achieved through techniques that trample on constitutional rights." [56] In disposing of this appeal, we do not enter the debate as to whether the narcotic vagrancy statute fulfills its intended mission.[57] What is clear to us, and what we hold, is that the subsections impugned in this case cannot contribute to that end consistently with the Constitution.

We reverse the judgment of the District of Columbia Court of Appeals with direction to remand the case to the District of Columbia Court of General Sessions for dismissal of the informations.

Reversed.

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[56] *Ricks I, supra* note 1, at 22. Compare *Lanzetta* v. *New Jersey, supra* note 36, 306 U.S. at 453-58 (statute banning gangsterism held void for vagueness); *Bolin* v. *State*, 266 Ala. 256, 96 So.2d 582, 583-86 (1957) (statute denouncing possession of ingredients for making tear gas bombs held void for vagueness); *Hanell* v. *Texas*, 166 Tex.Cr.App. 384, 314 S.W.2d 590, 592 (1958) (statute prohibiting possession and delivery of narcotics held void for vagueness).

[57] "Aside from its legal vulnerability, the law appears to have minimal law enforcement value, no treatment orientation and a potential for harassment of addicts dependent on their status alone. Construed literally, the statute might forbid gatherings of narcotic addicts for self-help in group therapy or Narcotics Anonymous meetings. Although it allows medical or psychiatric treatment as sentencing alternatives, these devices have not in fact been used to secure help for the addict. We believe that any preventive aspects of the law would be better achieved through a comprehensive drug treatment program and a more rational application of the District's civil commitment law to compel known adicts to submit to treatment in appropriate cases. The Commission therefore recommends repeal of the Narcotics Vagrancy Act." *Report of the President's Comm'n on Crime in the District of Columbia* 580 (1966).

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336-763—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1057

LOUIS E. WOLFSON AND ELKIN B. GERBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1968. A petition for rehearing was denied on January 23, 1969. The petition for a writ of certiorari was filed on February 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' sales of unregistered stock were exempt transactions under 15 U.S.C. 77d(1) or (4).

2. Whether the statute is unconstitutionally vague.

STATUTE AND REGULATION INVOLVED

The Securities Act of 1933, 48 Stat. 74ff, 15 U.S.C. 77, as in effect at the date pertinent to this prosecution provided in pertinent part:

Section 5(a), 15 U.S.C. 77e(a):

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 4, 15 U.S.C. (1958 ed.) 77d:

> The provisions of section 77e of this title shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; * * *
>
> (2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.[1]

[1] An amendment in 1964 (78 Stat. 580) in essence transferred subsection (2) of section 77(d) to subsection (4) and divided the provisions of subsection (1) into the three preceding subsections without substantive change.

Section 2(11), 15 U.S.C. 77b(11):

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking, but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

17 C.F.R. 230.154 provides in part:

> (a) The term "brokers' transactions" in section 4 (4)[2] of the act shall be deemed to include transactions by a broker acting as agent for the account of any person controlling, controlled by, or under common control with, the issuer of the securities which are the subject of the transactions where:
>
> (1) The broker performs no more than the usual and customary broker's function,
>
> (2) The broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commission, and the broker's principal, to the knowledge of the broker, makes no

[2] See note 1, *supra*.

payment in connection with the execution of such transactions to any other person,

(3) Neither the broker, nor to his knowledge his principal, solicits or arranges for the solicitation of orders to buy in anticipation of or in connection with such transactions, and

(4) The broker is not aware of circumstances indicating that his principal is an underwriter in respect of the securities or that the transactions are part of a distribution of securities on behalf of his principal.

(b) For the purpose of paragraph (a) of this section, the term "distribution" shall not apply to transactions involving an amount not substantial in relation to the numbers of shares or units of the security outstanding and the aggregate volume of trading in such security. Without limiting the generality of the foregoing, the term "distribution" shall not be deemed to include a sale or series of sales of securities which, together with all other sales of securities of the same class by or on behalf of the same person within the preceding period of six months, will not exceed the following:

(1) If the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (2) if the security is admitted to trading on a securities exchange the lesser of approximately (i) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (ii) the largest aggregate reported volume of trading on securities ex-

changes during any one week within the four calendar weeks preceding the receipt of such order.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on eighteen counts of selling (and in one count of conspiring to sell) a large block of Continental Enterprises, Inc. stock owned by them or members of the Wolfson family, without the stock being registered, in violation of 15 U.S.C. 77(e). Petitioner Wolfson was sentenced to imprisonment for one year and a fine of $100,000; petitioner Gerbert was sentenced to six months' imprisonment and a fine of $50,000. The court of appeals affirmed (Pet. App. A).

The facts are not in dispute. Petitioners, together with immediate members of Wolfson's family, owned approximately 1,150,000 shares of Continental Enterprises stock, or more than 40 percent of the total number of outstanding shares; the remaining shares were publicly owned. Between August 1, 1960, and January 31, 1962, petitioner Wolfson sold more than 404,000 shares of Continental through six brokerage houses, petitioner Gerbert sold 53,000 shares through three brokerage houses, and various members of the Wolfson family (including family trusts) sold 176,675 shares through six brokerage houses (Pet. App. A–2). These, in aggregate, were more than 25 percent of the outstanding number of shares and more than 55 percent of petitioners' holdings. Petitioner Wolfson, although not an officer or director of Continental,

was its "guiding spirit in that the officers of the corporation were subject to his direction and control and that no corporate policy decisions were made without his knowledge and consent" (Pet. App. A–2). Petitioner Gerbert was a director of Continental and petitioner Wolfson's "right hand man" (*ibid.*).[3] No registration statement was in effect as to Continental, whose stock was traded on the over-the-counter market.

Petitioners' defense, by which they attempted to show lack of intent to violate the law, was that they were unaware of any registration requirement with respect to stock of unlisted companies and that, operating at their own high levels of corporate finance, they could not be concerned about such "details" (Pet. App. A–3; Pet. 5–6; see G.A. 60a–61a, 112a, 117a–118a).[4] The Government introduced evidence tending to rebut this "defense" (Pet. App. A–3.)[5]

ARGUMENT

1. Petitioners were clearly in control of Continental and their sale of 25 percent of its outstanding stock was clearly a distribution effected without registration. They contend, however, that the distribution was

[3] Thus, for example, all of the sell orders for Wolfson's stock were placed by Gerbert.

[4] "G.A." refers to the government's appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[5] Petitioner Wolfson, *inter alia*, was shown to have attended a meeting in 1950 lasting over two hours with the Regional Administrator of the Washington, D.C., office of the Securities and Exchange Commission, in which the registration requirements of the Securities Act of 1933 applicable to controlling persons were explained in great detail. See G. Ex. 21.

exempt from the registration requirement because they acted through brokers who, if unaware of the circumstances of the distribution, would under Section 4(4) and implementing Rule 154 (*supra*) not have violated the law for their part in the transaction. This argument was properly rejected by the courts below. As the Securities and Exchange Commission made clear in its 1946 decision in *Ira Haupt and Company,* 23 S.E.C. 589, 601–602, Section 4(1) of the Act (15 U.S.C. 77d(1)), when read in conjunction with Section 2(11) (15 U.S.C. 77f(11)), establishes that

> [W]henever anyone controlling an issuer makes a public distribution of his holdings in the controlled corporation by selling through another person acting for him in connection with the distribution, the sales by which the distribution is accomplished are transactions by an underwriter which are subject to the registration requirements. Applied to such transactions by which substantial quantities of securities are disposed of to the public, the registration requirement is consistent with and calculated to further the general purpose of the Act to provide investors with pertinent information as a means of self-protection. The legislative history of the Act strongly sustains this conclusion.

The legislative history to which the Commission there referred is H. Rep. No. 85, 73d Cong., 1st Sess., pp. 13–14 which, in referring to the definition of underwriter in section 2(11), states:

> The last sentence of this definition, defining "issuer" to include * * * persons controlling the issuer, has two functions * * *. Its second

> function is to bring within the provisions of the bill redistribution whether of outstanding issues or issues sold subsequently to the enactment of the bill. *All the outstanding stock of a particular corporation may be owned by one individual or a select group of individuals. At some future date they may wish to dispose of their holdings and to make an offer of this stock to the public. Such a public offering may possess all the dangers attendant upon a new offering of securities.* Wherever such a redistribution reaches significant proportions, the distributor would be in the position of controlling the issuer and thus able to furnish the information demanded by the bill. *This being so, the distributor is treated as equivalent to the original issuer and, if he seeks to dispose of the issue through a public offering, he becomes subject to the act.* The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists. [Emphasis added.]

Thus the brokers in this case were, wittingly or unwittingly, acting as underwriters. The transactions involved were accordingly not within the exemption from registration which Section 4(1), 15 U.S.C. 77d(1), provides for "transactions by any person other than an issuer, underwriter, or dealer."

The *Haupt* decision in 1946 was not, as petitioners suggest, a basic change in the interpretation of the Act as applied to distribution by controlling persons.

It is true that before *Haupt* the Commission's approach had been that, if the broker were exempt, the affiliate of the issuer was exempt because he was not an issuer, underwriter or dealer. 1 Loss, *Securities Regulation* (2d ed., 1961), p. 700. However, as Professor Loss points out, the caveat was always added that a broker engaged in distributing any block of securities would probably be compelled to perform functions beyond those normally exercised by brokers, *op. cit.* p. 701. Thus it was assumed that distributions by controlling persons would in practice require registration. It was because this assumption proved incorrect in light of market conditions that the Commission re-examined the question in the *Ira Haupt* case.

As Professor Loss has stated, *op. cit.* at p. 703, "it could not be convincingly argued for a moment that Congress did not intend this kind of distribution to be subject to the registration requirement." The purpose of the registration requirement was to make available to the buyer of stock material information possessed by the seller in situations in which the seller ordinarily would have more information about the company than the buyer. A distribution by a controlling person made through a broker is likely to involve precisely that situation, and the courts below properly took account of this legislative purpose in holding that petitioners' distribution of the unregistered stock violated the Act. Cf. *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 124; H. Rep. No. 85, 73d Cong., 1st Sess., pp. 1–3, 13–14.

The same considerations refute petitioners' argument that, if the brokers were not shown to be aware that the sales were a distribution by a controlling person, they could not be acting as underwriters because they would not themselves violate the Act. It does not follow that, because the broker might not be a violator, he could not unwittingly be an underwriter.[6] As Professor Loss has said (*op. cit.* p. 706), if the seller "falsely represents to [the broker] that there have been no such sales and the broker has no reasonable ground to believe that there have been, he would still seem to be an 'underwriter' so as to destroy the exemption under the first clause of 4(1) for the selling customer.'" Or, as the court below succinctly put it (Pet. App. A–4 to A–5):

> [15 U.S.C. 77(d)(4)] was designed only to exempt the brokers' part in security transactions. * * * Control persons must find their own exemptions.

This petitioners are unable to do. Whether the brokers knew it or not, petitioners, as controlling persons, were using them as underwriters.[7]

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[6] Professor Loss considered criminal prosecution of a broker who was an unwitting underwriter "inconceivable as a practical matter." *Op. cit.* p. 706. He expressed no such doubts with respect to the liability of a knowing affiliate of the seller.

[7] The legislative history of the broker's exemption in Section 4(4)) indicates that its primary purpose was to permit ordinary investors to sell their stock through brokers in certain situations in which exemption from the registration requirement would be available to the seller under Section 4(1) but no exemption would otherwise be available to the broker. See H. Rep. No. 85, 73d Cong., 1st Sess., p. 16.

2. The considerations discussed above also answer petitioners' argument that Sections 4 and 5 are too vague either to serve as an objective guide to fair adjudication or to give fair warning of the proscribed conduct. A statute regulating the sale of securities is necessarily more complicated than a statute punishing simple theft. When petitioners sold the stock, the registration requirements of the Act had been in existence for almost thirty years, and the Commission's interpretation in the *Ira Haupt* case had been known for almost twenty. Whatever "fuzzy area" there may be with respect to the liability of innocent brokers acting for a person in control of an issuer (see Pet. 16 n. 17), there has, as noted above, been no real question that knowing distribution on the part of controlling persons is subject to the registration requirement of Section 5.

As to the adequacy of petitioners' notice and warning of proscribed conduct, we suggest, in the words of *United States* v. *Wurzbach,* 280 U.S. 396, 399, that "* * * no one not in search of trouble would feel any." This is particularly true in light of the long standing practice of the Commission's staff in furnishing advice, when requested, as to whether contemplated action would violate the Act. Moreover, petitioners could have avoided any problem by registering the securities. In any event, as the court below held, petitioners cannot properly rely on lack of notice in view of their defense that at their high management level they neither had notice, nor indeed were even aware of the statute. Cf. *Ricks* v. *United States* (No. 20,919A,

C.A.D.C.), decided December 23, 1968, set forth at Pet. App. D. Since petitioners claimed that they were ignorant of the registration requirement, they cannot urge that the allegedly ambiguous language of the statute led them to make sales they believed the Act did not cover. *Ricks, supra,* at Pet. App. D, D–5 to D–6; see, also, *United States* v. *Wurzbach,* 280 U.S. 396, 399; *United States* v. *Raines,* 362 U.S. 17, 21.[7]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MARCH 1969.

[7] The court below also properly rejected petitioners' subsidiary contention that the concept of "control stock" was impermissibly vague (Pet. App. A–6). As the court pointed out in a previous decision upholding the definiteness of the term (*United States* v. *Re.* 336 F. 2d 306, 316 (C.A. 2), certiorari denied, 379 U.S. 904), the "meaning of 'control' under the act is no different than it is in normal everyday usage. 'The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.' *Sproles* v. *Binford.* 286 U.S. 374, 393 * * *." See, also, *United States* v. *Petrillo,* 332 U.S. 1, 7–8; *Bass* v. *United States,* 324 F. 2d 168, 173 (C.A. 8).

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 1057

LOUIS E. WOLFSON AND ELKIN B. GERBERT,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

Of Counsel:

ARNOLD & PORTER
JAMES E. KRIER

HOGAN & HARTSON
AUSTIN S. MITTLER
Washington, D.C.

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PETITIONERS' REPLY

PRELIMINARY STATEMENT

A reading of the Brief in Opposition reveals that the Government has made an inadequate response to the Petition. The Government is completely unresponsive to one issue and attempts in response to the other to oversimplify the Securities Act of 1933, which was recognized by the trial court as presenting perplexing problems of interpretation and application in this case. (Pet. 18-19) This short Reply Brief is therefore necessary.

ARGUMENT

1. As to Vagueness and Standing

We submit our point on standing (Pet. 23-26) is quite clear—and quite clearly correct. Yet the Government says:

> "Since petitioners claimed that they were ignorant of the registration requirement, they cannot urge that the allegedly ambiguous language of the statute led them to make sales they believed the Act did not cover." (Gov. Brief 12.)

But petitioners have argued that they have standing to attack Sections 4 and 5 as too vague to meet the test that a statute must be certain enough to serve as a guide to fair adjudication. The Government recognizes that this is an applicable test, in addition to the test of fair notice (Gov. Brief 11.), and well it must. As the Court held in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966):

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.*" (Emphasis added.) See also *Ricks* v. *District of Columbia*, (No. 20,919 D.C. Cir.), December 23, 1968, Slip Opinion pp. 6-7, and Pet. 23-26.

The Government has not even attempted to demonstrate that petitioners lacked standing to attack the statute on this ground. It, like the Court of Appeals, appears to believe that petitioners lacked standing to challenge the constitutionality of Section 4 and 5 of the Securities Act of 1933 because petitioners "knew noth-

ing about" the provisions. (Pet. App. A-6.) But that a defendant had "never heard of" a statute at the time he allegedly violated it has nothing to do with his standing to attack it, not as being too vague to give *notice*, but as too vague to *guide his subsequent trial*. It is submitted that simply being *tried* under a statute gives standing to raise the question of adjudicative vagueness. It would seem that receiving a jail sentence under the statute—as did petitioners—would provide standing.

Petitioners challenged the Court of Appeals' ruling and pointed out its direct conflict with controlling decisions of this Court. (Pet. 23-26.) The Government's failure to respond to petitioners' contention underscores the merit of the claim and is a recognition of the fact that the Court of Appeals was wrong on the issue of standing. The Government in its Brief does not assert that petitioners lacked standing to attack the adjudicative uncertainty of the statute. Rather, it simply asserts in glittering generalities that the statute is not too vague. But this completely misses the point for this issue was never considered by the Court below. Petitioners submit that the Government's evasiveness cannot in any stretch of the imagination be considered an adequate response to the serious constitutional questions presented.

2. As to the Application of Sections 4 and 5

The Government's assertion that the brokers in this case were acting as underwriters (Gov. Brief 7-8.) overlooks the apparent concession of the Court of Appeals that the brokers here were exempt under Section 4(2). And, as we have urged, exempt brokers' transactions are, by definition, not underwriters' transactions. (Pet. 12-13.)

The Government's reliance on the legislative history of the Securities Act of 1933 is misplaced. It was in light of this very legislative history that the Securities and Exchange Commission itself held for 13 years that the Act permitted a broker to sell stock of a controlling person of an issuer in normal brokerage transactions without registration. The Commission's position and its interpretation of the legislative intent was that if the broker-dealer bought for his own account and sold to the public he would be acting as a conventional underwriter and no exemption would be available. On the other hand, the brokerage exemption specifically permitted a broker acting as an agent (or broker)) to sell without registration for his "controlling person" customer. Subsequently, the Commission did a clear about-face in the *Haupt* case. However, for the purpose of acting on this petition it is not necessary for this Court to decide whether the earlier or later interpretation had greater merit. The Court need only recognize, in light of these divergent interpretations, the overriding importance of having this fundamental question of interpretation resolved. In addition, as the Government's brief points out, the *Haupt* decision and the Commission's reinterpretation of the Act were in part based upon the assumption that the broker "would properly be compelled to perform functions beyond those normally exercised by brokers." The testimony in this case makes it clear that the brokers did not exceed the normal brokerage function. (Pet. 12 and n. 11.)

The Government has not even attempted to respond to the contention (Pet. 11-12) that the petitioners themselves were exempt under Section 4(1) because they were not issuers, underwriters or dealers. A con-

trary conclusion strains the plain language of the statute beyond constitutional limits. There is nothing in common sense or the legislative histories to support the position of the Court of Appeals and the Government that Section 4(1) applies only to *transactions,* rather than *persons,* and that Sections 4(2) applies only to *persons,* not *transactions.*

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

MILTON V. FREEMAN
EDGAR H. BRENNER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner Gerbert

WILLIAM O. BITTMAN
E. BARRETT PRETTYMAN, JR.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioner Wolfson

Of Counsel:

ARNOLD & PORTER
JAMES E. KRIER

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AUSTIN S. MITTLER
Washington, D.C.

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